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Oct. 9. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 135.

THE UNION MUTUAL LIFE-INSURANCE COMPANY, PLAINTIFF IN ERROR,

VS.

DANIEL A. MOWRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

FILED SEPTEMBER 25, 1875.

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1 **At a circuit court of the United States for the first circuit and district of Rhode Island, begun and holden at Providence within & for said district on the 15th day of June. A. D. 1875, before Hon. George F. Shepley, United States circuit judge, and Hon. John P. Knowles, United States district judge, the following cause amongst others was disposed of:**

DANIEL A. MOWRY
vs.
UNION MUTUAL LIFE-INSURANCE COMPANY.

Be it remembered that at the June term, 1872, of said circuit court the following record from the supreme court of the State of Rhode Island, for the county of Providence, was entered in this court:

Writ.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
Providence, sc:

[L. S.] To the sheriffs of our several counties or to their deputies, greeting:

We command you to summon the Union Mutual Life-Insurance Company, a corporation created by the legislature of the State of Maine, and transacting business in the city of Boston, in the Common-
2 wealth of Massachusetts, if it may be found in your precinct, to answer the complaint of Daniel A. Mowry, j'r, of the city and county of Providence, and State of Rhode Island, at our next supreme court to be holden at Providence, within & for our county of Providence, on the first Monday of October next ensuing the date hereof, in an action of the case, for that the defendant corporation hath not kept its promises to the plaintiff made, but the same hath broken, as by declaration to be filed in court will be fully set forth, to the damage of the plaintiff fifteen thousand dollars.

Hereof fail not, and make true return of this writ with your doings thereon.

Witness George A. Brayton, esq., at Providence, this 12th day of September, in the year 1871.

CHARLES BLAKE, *Clerk.*

PROVIDENCE, *sc:*

PROVIDENCE, *September 12th*, 1871.

I have this day summoned the Union Mutual Life-Insurance Company by leaving an attested copy of this writ with John D. Thornton, agent of the said Union Mutual Life-Insurance Company.

LYMAN UPHAM,
Dep'y Sheriff.

Service, 50; copy, 45; travel, 10—$1.05.

3 *Declaration.*

Supreme court, Oct. term, A. D. 1871.

PROVIDENCE, *sc:*

Daniel A. Mowry, j'r, of the city & county of Providence & State of Rhode Island, complains of the Union Mutual Life-Ins. Co., a corporation created by the legislature of the State of Maine, & transacting

business in the city of Boston, in the Commonwealth of Massachusetts, which has been summoned to answer the plaintiff in an action of the case; for that whereas the def'ts heretofore, to wit, on the 13th day of March, 1867, by a certain policy of insurance then made and effected by the said Daniel A. Mowry, j'r, with the defendant, it was witnessed that the def't, in consideration of the sum of $725 to them in hand paid by the said Daniel A. Mowry, j'r, and of the annual premium of $725 to be paid on or before the 9th day of March, in every year during the continuance of said policy, did assure the life of Nelson H. Mowry in the amount of $10,000.00 for the term of his life, for the sole & separate use of his nephew, said Daniel A. Mowry, j'r; and the defendant, by the said policy, did promise & agree to & with the said Daniel A. Mowry, j'r, his executors, administrators, & assigns, well & truly to pay the said sum insured to the said assured, his executors, administrators, or
4 assigns, 90 days' due notice and proof of the death of the said Nelson H. Mowry, during the continuance & before the expiration of this policy, and of the just claim of the assured or any other person as executor, administrator, guardian, or assign of the assured under it.

And the plaintiff further says, that the several conditions, restrictions, and stipulations contained in said policy are as follows, that is to say:

Provided especially, and this policy is made, & it is accepted by the assured & the said Nelson H. Mowry upon the express condition, that if the amount of annual premium herein provided for is not fully paid, with the interest due thereon, on the day & in the manner so provided for, then this policy shall be null & void, & wholly forfeited; and also, that no agent of this company except president & secretary can waive such forfeiture or alter this or any other condition expressed in this policy.

And in case the death of the person whose life is hereby insured shall be caused by risks consequent upon the engagement and employment of said person in a coal-mine, powder manufactory, powder transportation, railroad train, or steamboat, as fireman or engineer in a steam mill or steam factory, as an express carrier, or in lake or river or other inland navigations, said co. shall not be liable to pay the loss, unless lib-
5 erty shall have been given to engage in such employment; which liberty, if applied for, shall be given for a fair additional premium.

Said insured life has liberty to go (and the risk is to continue) on any passage by water coastwise, as a passenger, along the Atlantic & Gulf coast of the United States, New Brunswick, Nova Scotia, & Prince Edward's Island, between any of the ports or places from the entrance to the river S't Lawrence to that of the Mississippi River, with liberty to touch at any intermediate ports & at Cuba; also liberty to go as passenger (and the risk is to continue) between Europe & any of the Atlantic & Gulf coast ports within the limits above named, and to touch at the usual ports.

Said insured life has liberty occasionally to make excursions by boat or vessel on the sea-coast or on any river, lake, or pond for health, recreation or sporting: provided, that in case the said insured life shall die on a voyage or passage upon the high seas not permitted herein, this policy shall therefore be void and no loss recoverable under it. Said insured life also has liberty to travel on the ordinary routes of inland travel by the usual modes of conveyance; also to reside and travel indefinitely in Europe, New Brunswick, Nova Scotia, Prince Edward's Island, & in Canada.

6 This policy is also made and accepted upon condition that, except as provided herein, if the said person whose life is hereby

insured shall, without the consent of said co. previously given in writing, pass beyond the limits of the U. States, or shall without such voluntarily go to remain and shall remain, or shall without such consent voluntarily & without compulsion or irresistible necessity remain one week between the first of June & last of October south of the latitude of the southern boundary of Virginia, or shall without consent voluntarily be and remain over one month in any part of the year west of the Rocky Mountains, or shall without such consent enter into any military or naval service, (the militia not in actual service excepted,) this policy shall thereupon be void. And in case he shall die by his own hands, whether at the time sane or insane, or in consequence of a duel, or by the hands of justice, or in the violation of or attempt to violate, or in consequence of violating or attempting to violate the laws of the United States or of any State, country, or place, or shall become so far intemperate or addicted to any vice or habit as to seriously and permanently impair his health or induce delirium tremens, this policy shall be null & void, and the said co. shall not be liable for the loss.

7 It is also a condition of this policy, fully agreed to by the assured & the said Nelson H. Mowry, that if the statements made by or on the part, procurement, or behalf, or with the knowledge of the said assured to said co., as the basis or in the negotiations for this contract, shall be found in any respect untrue, then this policy shall be null & void.

And it is also a condition of this policy, accepted by the assured therein, that in case it become null & void for any of the above causes, or by forfeiture or otherwise, all payments of premium made thereon, and all dividend credits accruing therefrom and remaining unpaid, and all apportionments of profits thereto shall also be null & void, and shall not constitute any claim against the co. to any party, as by the said policy of insurance, ref/erence thereto being had, will more fully appear.

And also, for that whereas the def'ts heretofore, to wit, on the 13th day of March, 1867, by a certain policy of insurance then made and effected by the said Daniel A. Mowry, j'r, with the def'ts, it was witnessed that the def'ts, in consideration of the sum of $725 to them in hand paid by the said Daniel A. Mowry, j'r, he having an insurable interest in the life of his uncle, Nelson H. Mowry, and of the annual
8 premium of $725 to be paid on or before the 9th day of March in
every year during the continuance of said policy, did assure the life of the said Nelson H. Mowry in the amount of $10,000.00 for the term of his life, for the sole and separate use of his nephew, said Daniel A. Mowry, j'r, and the def'ts by the said policy did promise and agree to and with the said Daniel A. Mowry, j'r, his executors, administrators, or assigns, 90 days after due notice and proof of the death of the said Nelson H. Mowry, during the continuance and before the expiration of this policy, and of the just claim of the assured or of any other person as executor, administrator, guardian, or assign of the assured under it.

And the plaintiff further says that for the several conditions, restrictions, and stipulations contained in said policy, reference thereto being had, will fully appear. And thereupon, afterwards, to wit, on the day and year aforesaid, in consideration that the said Nelson H. Mowry, at the special instance and request of the def'ts, had then undertaken and faithfully promised the def'ts to perform & fulfill all things in the said policy contained on the part of the insured to be performed and fulfilled, the def'ts then undertook and faithfully promised the said Daniel A. Mowry, j'r, to perform & fulfill the said policy and agreements in all

9 things on the part and behalf of the said def'ts to be performed & fulfilled.

And the plaintiff in fact says that the premium in the said policy mentioned was duly paid by him to the def'ts, in each and every year, from the making of the said policy to and until the time of the death of the said Nelson H. Mowry, as hereinafter mentioned, at the time and in the manner in said policy on that behalf mentioned.

And the plaintiff in fact further says, that after the making of said policy and whilst the same was and remained in full force, to wit, on the day of , A. D. 18 , the said Nelson H. Mowry died, but not from his own hand or any of the causes enumerated in said policy, and due notice & proof was then given to the def'ts of the death of said Nelson H. Mowry.

And the plaintiff further says, that although the said Nelson H. Mowry in his life-time did at all times, from the making of said policy until the time of his death as aforesaid, conform himself to and observe, perform, fulfill, and keep all things in the said policy of insurance and the conditions & stipulations therein contained, on his part and behalf to be performed & fulfilled according to the tenor and effect of the said policy,
and although more than 90 days had, before the commencement of
10 this suit, elapsed since notice & proof was so given of the death
of the said Nelson H. Mowry to the def'ts, as aforesaid, of all which premises the def'ts, afterward and before the commencement of this suit, to wit, on the day of , A. D. 18 , had notice, and were then requested by the plaintiff to pay unto him the said sum of ten thousand dollars, so by them, the said def'ts, assured for the said Daniel A. Mowry, j'r, yet the def'ts, disregarding their said undertaking and promise, have not, nor has any person on their behalf, as yet paid unto the said plaintiff the said sum of ten thousand dollars or any part thereof, but the def'ts to do the same have hereunto *have* wholly neglected & refused, and still do neglect and refuse, to the damage of the plaintiff of fifteen thousand dollars, as laid in his writ.

Dated the twelfth day of September, A. D. 1871.

Wherefore he sues by his attorney,

JAMES C. COLLINS.

11 Supreme court, October term, 1871.

PROVIDENCE, *sc:*

DANIEL A. MOWRY, J'R,
vs.
UNION MUTUAL LIFE-INS. CO.

Df't's plea.

The said defendant corporation comes, &c., when, &c., and says it never promised, in manner or form as the plaintiff has above declared against them, and of this they put themselves upon the country.

By their attorney, C. H. PARKHURST.

I consent to the filing of the above answer.

JAMES C. COLLINS,
Pl'ff's Att'y.

Supreme court, October term, A. D. 1871.

PROVIDENCE, *sc:*

DANIEL A. MOWRY, J'R,
vs.
UNION MUTUAL LIFE-INS. CO.

Plea in set-off.

The defendants file the following claim in set-off:

For that the plaintiff, at said Providence, on the ninth day of March, A. D. 1867, by his promissory note in writing of that date by him signed, for value received, promised the defendants to pay to them or order the sum of three hundred and sixty-two dollars, twelve months after
12 date, with interest at six per cent. per annum.

Yet, though requested, the plaintiff has not paid said sum or any part thereof, but ever has refused, and does refuse to pay the same.

Wherefore they file the above claim in offset.

By their attorney, C. H. PARKHURST.

13 *Petition for removal.*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
City and County of Providence, ss:

Supreme court.

DANIEL A. MOWRY, J'R.
vs.
UNION MUTUAL LIFE-INS. CO.

To the honorable the supreme court of the State of Rhode Island & Providence Plantation:

The petition of the Union Mutual Life-Ins. Co. respectfully shows that your petitioner is the defendant in the entitled suit, and that the said defendant is a corporation created and established by the laws of the State of Maine, and is located at Augusta, in the county of Kennebec, in said State of Maine; that the above suit was commenced on September 12th, A. D. 1871, and was to be holden in Providence, in said county of Providence, on the first Monday of October, A. D. 1871; that Daniel A. Mowry, j'r, the plaintiff in the above suit, is, and was at the time of bringing the said suit, a citizen of State of Rhode Island, and the said Union Mutual Life-Ins. Co., the defendant in the above suit, is, and was at the time of bring' the suit, a citizen of the State of Maine.

And your petitioner further shows that at the time when the said suit was brought, there was and is a controversy between a citizen of the State of Rhode Island, to wit, the said Daniel A. Mowry, j'r, the
14 plaintiff in the above suit, and the said co., the defendant corporation therein, and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of the costs, and that the said suit has not been tried, but the same is pending for trial, and that said suit is removable to the circuit court of the United States by the act of Congress entitled "An act for the removal of causes in certain cases from State courts," approved July 27, 1866, as amended by the act of Congress approved March 2nd, 1867, entitled "An act to amend an

act entitled *An act to amend an act entitled* 'An act for the removal of causes in certain cases from State courts,' approved July 27, 1866;" and that your petitioner is ready & willing to do all the acts necessary to remove the said suit.

Wherefore your petitioner prays that the said suit may be removed into the next circuit court of the United States, to be held in the district of Rhode Island, in which the said suit is now pending.

And will ever pray,

UNION MUTUAL LIFE-INS. CO.,
By HENRY CROCKER, *Pres't.*

15 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
City & County of Providence, ss:

Supreme court.

DANIEL A. MOWRY, J'R,
vs.
UNION MUTUAL LIFE-INS. CO.

Now comes Henry Crocker, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, and as president of the said Union Mutual Life-Ins Co., and for and in behalf thereof, on oath says, that said company is a corporation created and established by the laws of the State of Maine; that the above-entitled suit was brought in said supreme court for the county of Providence, on Sept. 12th, A. D. 1871, and is now pending therein for trial; and that this deponent has reason to believe, and does believe, that from prejudice and local influence the said Union Mutual Life-Ins. Co., the defendant in the above suit, will not be able to obtain justice in said State court.

And further he saith not.

HENRY CROCKER.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

BOSTON, *Nov. 22nd*, 1871.

Personally appeared before me, Daniel Sharp, a notary public, by legal authority commissioned and duly qualified, Henry Crocker, president, and oath that the within statement by him subscribed is true. 16

In testimony whereof I have hereto set my hand & affixed my official seal this twenty-second day of November, A. D. 1871.

[L. S.]

DANIEL SHARP,
Notary Public.

Bond.

Know all men by these presents, we, the Union Mutual Life-Ins. Co., a corporation created and established by the laws of the State of Maine, as principal, and John D. Thornton, of Providence, in the county of Providence, in the State of Rhode Island, as surety, holden and stand firmly bound and obliged with Daniel A. Mowry, j'r, of the city and county of Providence aforesaid, in the full and just sum of five hundred dollars, to be paid unto the said Daniel A. Mowry, j'r, his executors, administrators, or assign', to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and succes-

sions, firmly by these presents, sealed with our seals, dated
17 the ninth day of December, in the year of our Lord one thousand
eight hundred and seventy-one.

The condition of this obligation is such that whereas a suit was, on the 12th day of September, A. D. 1871, brought in the supreme court of the State of Rhode Island, to be held at Providence, for the county of Providence, on the first Monday of October, A. D. 1871, wherein the said Daniel A. Mowry, j'r, is the plaintiff, and the said Union Mutual Life-Ins. Co. is the defendant; and whereas the said suit is now pending in said court for trial, and the said defendant corporation has filed in said court a pitition to remove the said suit from said court into the circuit court of the United States next to be holden in the district of Rhode Island, where the said suit is now pending:

Now, therefore, if the above defendant corporation shall enter or cause to be entered in the circuit court of the United States for the district of Rhode Island, on the first day of its session, after the order for the removal of said suit has been passed by said supreme court, copies of all process, pleadings, depositions, testimonies, & other proceedings in said
suit, and do or cause to be done all such other appropriate acts as
18 by the act of Congress approved the 27th day of July, A. D. 1866,
and entitled "An act for the removal of causes in certain cases from State courts," are required to be done upon the removal of a suit from a State court into the United States courts, then this obligation shall be null and void, otherwise to remain in full force and virtue.

UNION MUTUAL LIFE-INS. CO.
HENRY CROCKER, *President*. [L. S.]
JOHN D. THORNTON. [L. S.]

Executed & delivered in presence of—
C. H. PARKHURST.

PROVIDENCE, *ss*:

Supreme court, October term, A. D. 1871.

DANIEL A. MOWRY, JR,
vs.
UNION MUTUAL LIFE-INS. CO.

And now, upon this 73rd day of said term, the defendant in said action having made and filed in this court a petition for the removal of said action into the next circuit court of the United States to be holden at Providence, within and for the district of Rhode Island, on the fifteenth day of June, A. D. 1872, and setting forth that said defendant
is a citizen of the State of Maine; and having filed a bond with
19 good & sufficient surety for their entering in such circuit court
on the first day of its said session copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and doing all such other appropriate acts as by the acts of Congress and laws of the United States are required to be done upon the removal of a suit into the United States court.

It is therefore ordered, adjudged, and decreed that the court will proceed no farther in the said cause, and that the said defendant is allowed to remove said cause from this court to the circuit court of the United States next to be holden in Providence, within and for the district of

Rhode Island, on the fifteenth day of June, A. D. 1872, pursuant to their petition, on file as aforesaid.

Entered as the decree of the court this fourth day of January, A. D. 1872.

(73rd day October term, A. D. 1871.)

By order:

CHARLES BLAKE, *Clerk.*

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIO',
Providence, ss:

CLERK'S OFFICE, SUPREME COURT.

20 I certify the foregoing to be a true copy of the case Daniel A. Mowry, j'r, vs. The Union Mutual Life-Ins. Co., which said case was entered in this court, October term thereof, holden at Providence, within and for said county, on the first Monday of October, A. D, 1871, and upon the seventy-third day of said term the same was, upon petition of the defendants, ordered by said court of the United States for the district of Rhode Island and Providence Plantations. All which appears of record in this office.

In testimony whereof I hereto subscribe my name and affix the seal of said supreme court this sixteenth day of January, A. D. 1872.

CHARLES BLAKE, *Clerk.*

And said cause having as aforesaid been duly entered at the June term, 1872, of said circuit court, was from thence continued from term to term to the present November term, 1874, when it was called for trial before the following jury, who were sworn according to law to try the issue:

Henry B. Eddy, foreman; Jeremiah Blanchard, Denison E. Gallup, William Eddy, John E. Brown, Charles W. Harris, Samuel Arnold, Searles Capwell, W'm D. S. Havens, Cyrus A. Aldrich, J. Hobert Cross, Arnold C. Kelly.

21

PLAINTIFF'S TESTIMONY.

Testimony of Daniel A. Mowry, jr.

By Mr. Collins:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. What relation were you to Nelson H. Mowry?

A. I was nephew.

Q. In regard to business affairs; whether you were intimate or otherwise?

A. Yes, sir.

Q. How long have you been so?

A. A number of years.

Q. How long? Whether there was a close connection or an intimate connection between you & your uncle?

A. Ten or twelve years, probably.

Q. Irrespective of your business relations from boyhood up, how was it? What was your connection with your uncle from boyhood up? Whether you saw him often, & whether you were with him?

A. Yes, sir; very often.

Q. You have had business relations with him?

A. I have had some business relations with him.

Q. When did it commence?

A. I loaned him money in California, a large amount of money,
22 to go into business with, & he went into business but did not
succeed; lost the money, &c.

Q. He didn't succeed?

A. No, sir.

Q. Did you go to California together?

A. No, sir.

Q. Which went first?

A. He went first & I went afterwards; about a month's difference.

Q. He went first, & you afterwards went, & there you let him have money?

A. Yes, sir.

Q. To go into business with?

A. Yes, sir.

Q. Was that money paid back to you at the time this policy was taken out?

A. No, sir; it was not.

Q. Any other sums except that that you loaned him in California?

A. I loaned him some money here; $500.00 here. The amount I loaned him out there amounted to about $6,000.00, interest & all.

Q. After coming on here you say you lent him more?

A. Yes, sir.

Q. Was there any business connection between you & himself here, or any prospect of any?

A. There was a prospect. I was intending to start a business & let
him manage it. I was making an arrangement to buy out a concern
here & let him manage it.

23 Q. What kind of a concern was it?

A. The manufacture of soda in the city of Providence, here; soda water. We were going to monopolize the business.

Q. You were intending to go into it largely?

A. So as to monopolize the business; yes, sir.

Q. What was the agreement with him in regard to that transaction?

A. He was to receive one-third of the profits.

Q. Who was to furnish the capital?

A. I was to furnish the capital.

Q. Had you made that agreement with him?

A. I had made that agreement with him; yes, sir.

Q. Had he ever been in the business?

A. Yes, sir; that was his legitimate business.

Q. How did you consider him in that business?

A. I considered he knew the business thoroughly and was a valuable man in it.

Q. How far did you go with that operation?

A. I sent him to make arrangement at different times with the parties here. I was on the point of consummating the trade when he was taken sick.

Q. Was there that business prospect & that talk when you took out this policy in question?

A. Yes, sir.

Q. Go on and state the circumstances of taking out this policy; whether you applied to the co. or they to you, or who?

A. M'r Shepley applied to me several times.

24 Q. What Shepley?

A. John Shepley, of Providence. He represented that he was agent of the co., & solicited this policy, & was there several times to see me at my place of business. I told him my uncle talked of going to California. He said it would not make any difference whether he went to California or not. He also said in case I took it out that I should be notified when the premiums became due. He said it would make no difference whether he went to California or not, & that the company would notify me in season to pay the premiums. I need have no uneasiness about the matter at all; I should be notified in time from the company in Boston.

Q. Was this before or after taking out the policy?

A. This was before. We had several interviews about it at different times; about the terms, &c.

Q. In regard to these notices: You say there was some considerable conversation, & he assured you that the notice would be sent to you when the premiums became due?

A. Yes, sir; he said I should have due notice when the premi-
25 ums became due, & in time to send on to the co. in Boston; that
the company in Boston would notify me. These were the words
used.

Q. Where was the conversation?

A. At my place of business.

Q. Who was the party that you had this conversation with in every instance?

A. John Shepley.

Q. Did you do the business or any business in regard to this transaction through any other person than John Shepley?

A. No, sir; I did not.

Q. Is that the name of the party that appears on the policy?

A. Yes, sir.

Q. To whom did you pay any money, if you paid any?

A. I paid to John Shepley.

Q. How much?

A. The amount of the annual premium, $700.00, & whatever it was. I think I paid him one-half cash & one-half note.

Q. Who received that money & the note?

A. M'r Shepley.

Q. Did you ever, during this transaction, have any conversation with any officers of the company, or go to the co. yourself?

A. I did not until after the decease of my uncle.

Q. Did you have any dealings with anybody else in the transaction except M'r John Sheply?

A. No, sir.

Q. This, I see, was issued March 9, 1867. State, if you please, the
circumstances of your uncle's death. First, in regard to your
26 uncle's going to California. Did he go to California?

A. He did. I got a permit from them.

Q. From whom did you get that permit?

A. From M'r Shepley.

Q. For him to go to California?

A. Yes, sir.

Q. That required a permit by the terms of the policy?

A. Yes, sir.

Q. How long was he gone to California?

A. He was gone five months the last time.

Q. And returned back to this city?

A. Yes, sir; he was intending to be gone longer—about a year & a half.

Q. What time did he return?

A. He went away in April & returned, I think, in October.

Q. Previous to his death?

A. Yes, sir.

Q. What time did he die? Restate the circumstances.

A. He died the next spring, in April.

Q. What year?

A. 1868. He went to California directly after this insurance was obtained & died the next year.

Q. What was your uncle doing after he returned from California?

A. He took a business where there was a party owing him money, & he was obliged to take it. It was a billiard saloon. He could not get any money & he took the business. But he wanted to get out of
27 it & was trying to get out of it.

Q. Now, as to the circumstances of his death, if you please. When did you first hear of his sickness & the circumstances?

A. It was after he had been sick probably two days or so. The physician came & told me he was sick. I went down & saw him & had him removed from the place. There was no fire in the place, & I thought it was not a very good place for him.

Q. To what place did you have him removed?

A. I had him removed up to North Court st.

Q. Near the court-house?

A. Yes, sir; to M'r's Andrew's house. M'r's Andrew's; a boarding-house.

Q. How did you have him removed?

A. In a coach; a close carriage.

Q. Who was his physician?

A. D'r Rivers was one, & D'r Mowry, another uncle of mine; a brother of his.

Q. D'r Rivers is now——

A. He is now dead.

Q. How soon after his removal was D'r Rivers called in?

A. He was called in immediately.

Q. By whom?

A. I called him in. I think it was next to his office, on North Court st., where the house was.

Q. How long did he live after that?

A. I think a day & a half or two days.

Q. What was his difficulty, if you understood it?

A. P*h*eumonia.

28 Q. Who attended to the burial & taking care of the body?

A. I attended to it myself; that is, the preliminaries.

Q. Where was the funeral held?

A. At my father's house; his brother.

Q. In regard to the renewal notice; did you receive any notice from the co., as it was stated you would?

A. No, sir; I did not.

Q. Where did you see any renewal notice, if any?

A. I saw it in his room, after his decease, on the table with some other papers laid there.

Q. Before I go to that, for fear I may forget it, where did you keep that policy?

A. I deposited it, with some other papers, up at the Fletcher M'f'g Co., on Charles st.

Q. Did you have access to that safe?

A. No, sir.

Q. You deposited it with M'r Fletcher, your wife's father.

A. My father-in-law.

Q. Why did you deposit that paper there?

A. Because I had no room in my safe for valuable papers. It was a safe built for jewelry; drawers sliding in & out.

Q. Did you keep your papers up there generally?

A. Yes, sir. I do now; some papers.

Q. In regard to this notice: you said you got no notice from the co.
or M'r Shepley. Did you make any reliance on M'r Shepley's
29 word in regard to the time for the payment of these premiums?

A. Yes, sir; I put confidence in what he told me.

Q. For what?

A. That the co. would notify me & give me plenty of notice when it became due; that I should receive notice from the co. in Boston.

Q. Did you do anything different, &, if so, what, from what you would have done?

A. No, sir; I didn't do anything different, because I relied on what he told me.

Q. You say you received no notice, do you? The first you saw of any notice was—when?

A. The first I saw of it was on the table after his decease. I opened it. I saw on the envelope it was addressed to him.

Q. To whom?

A. Nelson H. Mowry.

Q. What did you do?

A. I think it was next day after the funeral I went to see M'r Shepley.

Q. Where is that notice; have you it?

A. No, sir; I have not got it. I sent it down at the time I made the payment—when the check was sent. It was requested to be sent down when the check was sent, & I sent it down by express after you told me to send down the money. I suppose the expressman has it. I have the envelope.

Q. Read what there is on there, printed & all.

A. (Reading:) "Union Mutual Life-Ins. Co., directors' office, 80 Wash-
ington st., Boston. M'r Nelson H. Mowry, Providence, R. I., Feb.
30 27." Post-marked.

(Put in & marked "A.")

Q. The notice you say you gave to the expressman?

A. I gave it to the expressman with the check for the premium.

Q. Then what did you do in regard to the matter? You were about saying you went to M'r Shepley.

A. I went to M'r Shepley about it, & asked him why it was I was not notified by the co. according to the agreement, & he said he didn't understand it, or didn't know; he would go down to Boston with me, or take me down to see the president. So he took me down there & introduced me to the president. I notified him that was dead, & asked him why it was that I was not notified in time to pay it. He said it was customary to notify the parties whose life was insured, I understood him to say. I told him I was the party insured virtually, because I paid the premium, & and they held my note for one-half the premium, & the policy was made payable to me in case of loss, & it was expressly understood between me & M'r Shepley that the co. would notify me.

Q. What reply did he make, if any?

A. I don't recollect exactly what he said about it. I believe he said I might recover by the laws of R. I., or something of that kind.

Q. Did he expressly admit or deny the agency? What did he say
in regard to the agency? Have you anything further to say on
31 that? What was said in regard to that; whether there was
anything more said than you have stated? If so, state it.

A. I can't recollect, it was so long ago, exactly what the conversation was. He didn't give me much satisfaction on the other matter at any rate. I then came back & sent down the check. I saw the amount that was due & sent down the check, with the renewal notice, by express.

Q. Why did you send that down?

A. Because I applied to you as counsel & you said it was due, & that I had better send it down before I could recover the amount, or something of that kind.

Q. You notified them at that time or told them that your uncle was dead?

A. Yes, sir.

Q. Afterwards did you send them a sworn statement?

A. I did, afterwards.

Q. Do you recollect when that was?

A. It was some time after that.

(Proofs of death put in & marked "B.")

Q. State, M'r Mowry, whether there was any question about the proofs or any requests for any further statement in regard to the fact of the death, when you told them?

A. No, sir; there was nothing said.

Q. Did you ask them anything in regard to blanks?

A. No, sir; I did not ask them.

32 Q. You say you sent down a check; what became of that check:
do you know?

A. I do not; no, sir. I believe it was returned to the expressman's office—to the express office in Boston.

Q. You stated in the begining of your testimony that you paid part of this in cash & part in note; in one note or more?

A. One note.

Q. Where is that note now, do you know?

A. I don't know, without I suppose the co. have it.

Q. Did they ever return it to you?

A. No, sir.

By M'r Parkhurst:

Q. Have you the permit you say you received from M'r Shepley?

A. That was left on my desk in my office when I was away from my place of business.

(Permit put in & marked "C.")

Q. You say you found this on your table?

A. That was left on my desk when I was out one day.

Q. I understood you to say, in your direct examination, you received it yourself from M'r Shepley.

A. I was told afterwards.

Q. I want your own knowledge.

A. That was left, I say, on my desk.

Q. That is all you know about it?

A. I was told afterwards——

Q. I am asking for your own knowledge. Do you know, of your own knowledge, how this was left on your table?

33 A. M'r Shepley told me afterwards——

Q. I ask for your own knowledge. Be kind enough not to state what anybody told you, unless it was M'r Crocker or M'r Hollister. All you know about it of personal, individual knowledge is, it was left on your desk?

A. Left on my desk, I suppose, by M'r Shepley. He told me afterwards.

Q. Can you give us the date when you went with M'r Shepley to the office of the co. in Boston & had an interview with M'r Crocker?

A. No, sir; I cannot. I think it was two days after the funeral. That was on the 12th of April.

Q. Did you ever send or go yourself to the office of the co., or send by anyone else except the sending by express, as you have stated, after the death of your uncle?

A. No, sir.

Q. Did you ever send a check there by any other person except the expressman?

A. A check? No, sir.

Q. You say you don't know what became of that package?

A. I understood the package was returned to the express office.

Did you yourself go to the office of the ins. co. with a check?

A. No, sir.

Q. At no time?

A. At no time.

34 The check that you referred to you understand to be in the possession of the express company?

A. That is what I have been told; yes, sir.

Q. It never has been paid?

A. It never has been paid; never has been presented for payment.

Q. Was this the only policy you had upon the life of your uncle?

A. I had one other at that time.

Q. Only one?

A. Only one.

Q. At the time when your uncle died?

A. Yes, sir.

Q. At the time the uncle died?

A. At the time that this policy was taken out, I had one.

Q. At the time he died?

A. I had others.

Q. How many?

A. Three others.

Q. For what amount?

A. The amount was $10,000.00 each.

Q. In each co.?

A. Yes, sir.

Q. You had insurance for $40,000.00?

A. Yes, sir.

Q. Through whom were those policies obtained?

A. They were obtained through M'r Shepley.

Q. In what companies?

A. One is in the Home Life-Ins. Co., one in the World, one in the Brooklyn, & this one in the Union Mutual.

35 **Q. Can you tell us about what time the payments became due upon those policies?**

A. On all of them about the time when this payment became due.

Q. Within what time were they taken out? How near together?

A. Some of them were taken out probably within three weeks.

Q. How many of them?

A. One of them.

Q. Which was that?

A. I think that was the World.

Q. Three weeks of the time of this one?

A. No, sir. There was none taken out after this was taken out until the next fall. I took out one the next fall, through M'r Shepley's solicitations. Some time in the fall.

Q. There was one policy taken out at the time when this policy was taken out?

A. Yes, sir.

Q. Which was that?

A. In the Home.

Q. About what time; how near to the time when this policy was taken out?

A. That was three years before, in the Home.

Q. Did you keep all of those policies together?

A. Yes, sir.

Q. At the Fletcher M'f'g Co.

A. Yes, sir.

Q. Did you ever have occasion to look at the polices from the time they were taken out.

36 A. I never did. No, sir.

Q. You never looked at any of the policies?

A. No, sir. I don't think I looked at any of them after I took them out.

Q. Is that the application which you made for insurance to the Union Mutual Life-Ins. Co. for this policy?

A. Yes, sir, it seems to be.

Q. It bears your signature, does it not?

A. Yes, sir.

By Mr. Collins:

Q. What has become of the World Co.?

A. It burst up.

Q. Did you ever get anything out of that?

A. No, sir.

37 *Testimony of N. Van Slyck.*

By M'r Collins:

Q. Do you know John Shepley?

A. I do, sir.

Q. How long have you known him?

A. I cannot tell how many years.

Q. Do you know anything about his acting as agent of this company at any time; &, if so, what do you know about it?

A. Only so far as concerns myself.

Q. State that, or anything in connection with the agency.

A. He applied to me as agent of the Union Mutual Life-Insurance Co., I think it is called, of Boston, to be insured, a number of years ago, &

followed me quite persistently until something like two or three years ago. I can state circumstances so that the date can be got at when I became insured in that co.

Q. You yielded?

A. I yielded to his solicitations, & am very glad to find I have had
no occasion to call upon the co. for the policy. I must have been
38 insured two years ago the 29th of this month, I think, because I
paid three assessments, or premiums, or whatever they may be
called.

Q. What representations did M'r Shepley make to you in regard to the payment of premiums, if anything?

(Objected to and excluded.)

Q. Do you know anything about whether the co. recognized the agency of M'r Shepley?

A. Not otherwise than except after the payment of the first premium, the balance of the correspondence was with the co. itself.

Q. How far back did he first apply to you for a policy?

A. A long time ago; as much as six or seven years ago.

By M'r Parkhurst:

Q. You entered into no contract with the co. until two & a half years ago?

A. That is correct.

Testimony of Henry S. Knight.

By M'r Collins:

Q. Where do you reside?

A. In New York City at present.

Q. Where did you reside in 1867 & '68?

A. Providence.

Q. What is your occupation?

A. Jeweller.

Q. Had you any connection with M'r Mowry at that time?

A. I was foreman for him at that time.

39 Q. In what year?

A. 1867.

Q. M'r Mowry, the plaintiff?

A. Daniel A. Mowry.

Q. You were there in 1867, were you?

A. Yes, sir.

Q. Do you remember or know anything about this conversation with M'r Shepley in regard to this policy?

A. I heard some of the conversation in M'r Mowry's office before the policy was taken out; at the time they were negotiating for it.

Q. State, if you please, what that conversation was.

A. The conversation turned on M'r Nelson Mowry's going to California; & M'r Mowry asked M'r Shepley how it would be about notifying when the premiums were due. M'r Shepley told him he need not give himself any uneasiness on that account, because the co. would notify him.

Q. When the premiums became due?

A. Yes, sir.

Q. How many times do you recollect hearing conversation in regard to taking out this policy?

A. Once or twice: I cannot recollect exactly. M'r Shepley was trying to get me to take out a policy at the time, & I heard considerable of the conversation.

Q. On your own life?

A. Yes, sir.

Q. Was there any representation made by him in regard to his
40 agency for the Union Mutual Life-Insurance Co.?

A. He represented himself as agent for the company.

Q. Do you mean to yourself, or to M'r Mowry, or in M'r Mowry's presence to yourself?

A. He represented himself to myself & also to M'r Mowry.

Q. You heard him?

A. Yes, sir.

Q. How many times, M'r Knight, in all, do you think you have seen M'r Shepley in M'r Mowry's office in regard to the insurance business?

A. I could not tell exactly. I should think I had seen him there ten or twelve times, at the least calculation.

Q. Did I understand you to say he was soliciting M'r Mowry & requesting him to get insured in this company?

A. Yes, sir.

Q. You have said that M'r Shepley said to M'r Mowry he need give himself no uneasiness about the matter?

A. M'r Mowry asked him about it, & he said he need not give himself any uneasiness.

Q. Did M'r Mowry make any reply; if so, what?

A. I don't recollect exactly what the reply was.

Q. Was that before or after the bargain was completed that these statements were made?

A. It was before.

41 By M'r Parkhurst:

Q. Did he say anything about being agent for any other companies?

A. I think he did; yes, sir.

Q. Do you remember what companies?

A. I think he said the Home.

Q. Any other?

A. I could not tell you, sir.

Testimony of Theophilus Salsbury.

By M'r Collins:

Q. You reside in this city, M'r Salsbury; do you know John Shepley?

A. Yes, sir.

Q. Have you had any dealings with him, & if so, when, in regard to insurance?

A. I never knew the man until the early part of the year 1867, when I took out a policy of life-insurance issued by the Union Mutual Life-Insurance Co. of Maine, having its office in Boston.

Q. Did you have any transactions in regard to taking out that policy with any other individual than M'r Shepley?

A. Not originally; no, sir.

Q. How much is the amount of that policy?

A. $5,000.00.

Q. Have you the policy?

A. Yes, sir.

(Witness produces it.)

Q. Is that the policy you took out at that time with M'r Shepley?
A. Yes, sir.
(Policy put in, number 20457, marked "E."

42 By M'r Parkhurst:

Q. Where did you pay the premium on your policy?
A. I think I paid the first premium to M'r Shepley.
Q. When you received the policy?
A. Yes, sir; at my place of business.
Q. How about the subsequent premiums?
A. I have no record of how I paid the second premium. I have a record of how I paid the third & fourth, & I think all the future premiums were paid by remittances directly to Boston.
Q. What did you send to Boston for payment?
A. Checks on Boston. Drafts on Boston banks.
Q. Your own cashier's checks?
A. Yes, sir.

By M'r Collins:

Q. You received notice of the time the premiums became due from the company?
A. Yes, sir.
Q. Always, in every instance, & in all cases you received notice?
A. I don't remember any case where I did not. I kept the run of my own policies, but I think in every instance I received notice from the company.
Q. That the premium would become due at such a time?
A. Yes, sir.
(Another policy, number not given, put in & marked "F.")

43 *Testimony of Henry Prew.*

By M'r Collins:

Q. What is your business?
A. Express-man.
Q. You will state what you did, if anything, in regard to carrying a check to the Union Mutual Life-Ins. Co. for Daniel A. Mowry; and, if so, when it was, & what was done.
A. I carried a package to the Union Mutual Life-Ins. Co. and delivered it to them, & they signed for it on my express-book, & after that they came back to my office in Boston & saw M'r Gibbs, the agent there, & told him there was something wrong about the check, or something of that kind, & M'r Gibbs told me I had better go to the office. I went over to the office and saw some one there. I could not tell who it was. They said there was something wrong about the check, & they would not accept it, & wanted me to return it. I told them I would return it to M'r Mowry if he would accept it, well and good; if he did not want to accept it I should return it. They said they would not receive it, but they had received it, & they left it in my office, & it lay there until last June.
Q. They receipted for it on the back?
A. Yes, sir.
Q. Is there receipt there?
44 A. Yes, sir; it is signed for by W. H. Hollister, E. A. I don't know who signed it; some one signed for it. I don't know who it was.

Q. You went back to the company's office ?

A. Yes, sir.

Q. Did they say anything about M'r Mowry, whether he was dead or not ?

A. I think that is where I heard he was dead. I think it was either there or M'r Gibbs, the agent, in 8 & 10 Court Sq., Boston. I told them I would return it to M'r Mowry, & if he wanted to receive it, well & good ; but I had made a delivery & could not return it as not having been received by them.

Q. Was not the reason they gave for not receiving it that M'r Mowry was dead ?

A. I could not say it was them or M'r Gibbs. I could not say as to that. That is where I learned that M'r Mowry was dead. It was either M'r Gibbs or them, I could not say which.

By M'r Parkhurst :

Q. What became of the package ?

A. I have got it. They left it in the office.

Q. What time did you leave it at the office ?

A. I left it between the hours of, I should think, *of* 2 and 3 o'clock, because the train arrives there twenty minutes to one, & I must
45 have delivered between that time.

Q. What day of the month and year ?

A. It is signed here April 23.

Q. What year ?

A. 1868 on the envelope.

Q. When did it get back into your office ?

A. The same day I delivered it to them.

Q. How long afterwards ?

A. I could not say ; I should think it was an hour, or something like that. I went around to deliver my packages, & when I got back these parties had been in & left this package.

Q. Did you see them in there yourself ?

A. No, sir.

Q. This package has remained in your possession up to this time ?

A. It remained with M'r Gibbs until June. It is a general express office, and represents seventy or eighty express-men, & they left it there at the desk, & I let it remain. M'r Gibbs had it until last June, when I was summoned here to court. That is the original envelope & papers just as they went down.

Q. It has been in possession of the express co. from that time down to the present ?

A. Not my express co. ; I have a separate place. It was in M'r Gibbs' possession.

Q. He was not your agent ?

46 A. No, sir—yes, sir ; I think he was when this was returned.

Q. You found it there when you got back from your delivery ?

A. Yes, sir ; he told me the parties had been in there and had left it. He said they were provoked ; there was something wrong about it, & I went over and saw them. I don't know whether M'r Gibbs told me, or they told me in the Union Mutual Life-Ins. Co., that the man was dead.

Q. You understood that to be the reason for declining to receive it ?

A. They didn't say anything to me when I delivered it. They accepted it without any conversation. I went in there & left the package the same as I would in any place of business, & opened my book & put it on the counter, & this party received & receipted for it, & then I came out. When I returned to the office I found it there.

By the court:

Q. Did you leave a sealed package & they receipt for that package, or did they open the package & give you a receipt for the check?

A. They did not open the package & give me a receipt for the check. They did not give me a receipt for the check. I can't say they didn't open the package; that is, they didn't give me a receipt to bring
47 to Mowry, but they gave me a receipt to show I had made a delivery of this amount of money to them.

The receipt was read, as follows:

Received at Providence, (?) April 23, of Earl & Prew's Express, the following articles set opposite our respective names:

Article.—$384.92. Signed.—Union Mutual Life-Ins. Co. Charges.—35 c'ts. By whom received.—W. H. Hollister, per E. A.

The address of the package was read, as follows:

BOSTON & PROVIDENCE EXPRESS.

Money package, 384.92. From D. A. Mowry, Providence, April 23, 1868, for Union Mutual Life-Ins. Co., Boston, Mass.

(Package put in & marked "G.")

Q. Do you recognize any of these gentlemen, either of these four gentlemen who sit here, as the parties with whom you had conversation, as you say, in the office; do you recognize any one of them?

A. No, sir; I don't know as I do; but I think I could remember the man that receipted the book, because I go in there twice a year; because I have two policies in the same office & I go in twice a year, & I remember him.

Q. Do you remember any of these four gentlemen who sit here behind me?

A. No, sir.

Q. As having any conversation with them?

48 A. No, sir; I can't say I had any conversation with them. The gentleman that had conversation with me was sitting at the desk fronting on Court st. I could not swear who the gentleman was, but his office was fronting on Court street.

DEFENDANT'S TESTIMONY.

Testimony of Henry Crocker.

By M'r Parkhurst:

Q. You are the president of the defendant company?

A. Yes, sir.

Q. Were you in March, 1867?

A. Yes, sir.

Q. And for how long prior to that?

A. Since 1861.

Q. I will ask you if at any time your company appointed M'r John Shepley as agent of the company in Providence prior to March, 1867?

A. No, sir.

Q. Will you state to the jury an exact relation of the facts connected with the application of Daniel A. Mowry for insurance upon the policy herein sued; what connection M'r Shepley had with it from the beginning to the end until the policy was issued; when you first knew of the application?

A. When the application first came into my hands for consid-
49 eration & examination.

Q. I will ask you if at that time M'r John Shepley was your agent in Providence?

A. In no sense the company's agent.

Q. The application which you now hold in your hand was accepted by the company & thereupon the policy issued?

A. Yes, sir.

Q. Who brought the application to the office?

A. I don't know, sir.

Q. To whom was the policy delivered when it was executed by the co.?

A. It was not in my department to send it out, therefore I cannot speak very positively about it.

Q. Had your company at that time any agent in Providence; any appointed agent?

A. No, sir; I think we had not. I know we had not.

Q. In reference to the other policies that have been put in, the policy of M'r Salsbury & M'r Potter. If you have any knowledge, will you state what M'r Shepley's relation was to those policies?

A. Precisely the same relation as with that one.

Q. He brought the application to your office?

50 A. He brought them there as other brokers do, if he brought them. I do not know that he did. If he presented them, he presented them as a broker.

Mr. BRADLEY. If he brought them he brought them as a broker. We don't want any suppositions.

WITNESS. I have said already I don't know that he brought them.

Mr. BRADLEY. If I didn't know, I would not testify.

Q. Had Mr. Shepley at the time this policy is dated, or this application is dated, any blanks of the company furnished him by the co.? Had M'r Shepley at the time this policy was issued to the plaintiff in this case any of the blanks of the co. in his possession furnished by the company?

A. I cannot answer that any better than I did the prior one. It is not in my department.

Q. Come down to the time of the interview between M'r Mowry & yourself. M'r Mowey testifies that some time in April, 1868, he had an interview with you in your office in Boston; I will ask you in regard to the interview between M'r Mowry and yourself in your office in Boston.

51 A. I have no recollection of having any such interview. I might have had, but I don't recollect the man in any way, nor any such interview with him.

By M'r Collins:

Q. Don't you remember M'r Shepley's going there with M'r Mowry?

A. No, sir; I do not; I don't think he ever did.

Q. In your private office?

A. He might have done so.

Q. He might have done so & you not remember it. You have a very extensive business?

A. I have an extensive business & an extensive acquaintance & frequent introductions.

Q. Had you yourself or any officer of the company, to your knowledge any communication with M'r Mowry personally in regard to the policy before it was issued?

A. I certainly had none; I don't think any one else had.

Q. None, then, so far as you know; no communication with M'r Mowry before this policy was taken out in regard to the policy, except through M'r Shepley, so far as you know?

A. No, sir.

52 *Deposition of Ephraim Atwood, read and put in.*

EPHRAIM ATWOOD, a witness for the defendant, being first duly sworn, in answer to interrogatories proposed by C. P. Judd, esq., counsel for defendant, testifies as follows, viz:

Q. What is your name, age, & place of residence?

A. My name is Ephraim Atwood; age, sixty nine; residence, Cambridge, Mass.

Q. Do you know the Union Mutual Life-Ins. Co., the defendant in the above case of Daniel A. Mowry vs. said co.? If so, about how long have you known such co.?

A. I do; since Sept. 1, 1862.

Q. What connection have you, if any, with the Union Mutual Life-Ins. Co., the defendant in the above case?

A. I am employed by them as book-keeper, & have been since Sept. 1, 1862.

Q. State if you know where the office of the said Union Mutual Life-Ins. Co. was on the 23rd day of April, A. D. 1868.

A. 27 Court street, Boston, Mass.

Q. State whether or not an express-man handed you any package on the 23rd day of April, A. D. 1868; and, if yea, state as fully as you can, of your own knowledge, what took place with reference to said package.

53 A. On the 23rd day of April, 1868, an express-man called at the office of the Union Mutual Life-Ins. Co. with a package; I can't say whether directed to Union Mutual Life-Ins. Co. or to the secretary; but to one of them, I think. I said to the express-man: I receipted for it, which was in accordance with my general orders. I said to the express-man that the cashier was out, & on his return he would attend to the contents of the package.

I farther stated to him that we wouldn't tax him to call a second time, but if there was anything to be returned we would send it to the office. He said, "Send to Earle's Express," giving me the street and number. He left the cashier's desk, & before he reached the door that led into the entry he stopped and said: "I wish you would open that package." I did so. As I opened it I noticed from some papers that met my eye that the package was intended for the New England agency, of which E. F. Childs was general manager.

I looked over to M'r Childs' desk & saw there was no one there, & laid the package one side awaiting his return. On his return, I
54 took the package, carried it to M'r Childs; said to him I had
receipted for a package sent to the home office which appeared to belong to his department. He looked at the package—I can't say whether he took it into his hands or not—and said, "I shan't receive that package." He said the man refused to pay his premium and has since died.

I then called on the secretary and told him the facts about it. The secretary said the co. won't receive such a package as that; return it to the express office. I then went to the place this express-man named to me, Earle's Express office; went to the counter & said to a man standing behind it, "I want to find Earle's Express." He said, "This is Earl's Express." I said to him I had receipted for a package directed to the Union Mutual Life-Ins. Co. which, upon opening, was found to belong to the New England agency, and the manager refused to receive it, & I returned the package and wished to have the receipt erased from the book.

I handed it to him & he took it and laid it back on the shelf or some
place. He said that the express-man that left the package was
55 then out, but if I would call in the afternoon, I think a little after
four, the man would be in with the book.

I returned to the Union Mutual Life-Ins. office. About the time named by the man, I left the office in company with J. W. Fletcher; went the second time to Earle's Express office & found the man in that left the package. I said to him that the package I receipted for belonged to the New England agency; that I had returned the package to the express office, & now wished the receipt erased from the book. He said that he had delivered the package and shouldn't do anything further about it.

Before I left, the man who first took the package from me handed out a package which looked like the one I gave him when I was there the first time, though I was not close enough to be sure, & requested me to take it; but this I declined to do, & the package remained in his hands when I left the express office & I have not seen it since.

Q. Who was the secretary of the co. referred to in your former answer?

A. W. H. Hollister.

Q. What orders had you had about receipting for packages de-
56 livered to the company by express-men, referred to in your former
answer?

A. Some time before this occurrence the secretary said to me, "If you see an express-man at the cashier's desk and the cashier isn't there, I don't want you to keep the express-man waiting, but receipt for the package and lay it one side for the cashier to attend to when he returns."

Q. What do you mean by the tearm "New England agency"?

A. I mean that policies issued in the New England States, to parties there, were under the charge of M'r Childs; that is, such as were procured by him or his agents or brokers. A separate apartment in the office was appropriated to this agency.

Q. State, so far as you know, what said J. W. Fletcher had to do with said company?

A. He was in M'r Childs' office as an assistant in that department. I don't know exactly in what capacity.

EPHRAIM ATWOOD.

Testimony of E. F. Childs.

By M'r Parkhurst:

Q. Were you connected with the Mutual Life-Ins. Co. in 1867 & '68?

57 A. I was.

Q. In what capacity?

A. Superintendent of agencies for the New England States.

Q. Including all the New England States.

A. The six New England States?

Q. Did you receive this application for insurance that has been presented?

A. I did, sir.

Q. From whom?

A. John Shepley.

Q. You laid it before the company?

A. I laid it before the president.

Q. Did you subsequently to the time *after* the issuing of the policy in 1868 have any interview with Mr. Mowry?

A. I did, sir.

Q. Can you give us about the date?

A. I cannot give you the exact date; probably about April 23rd, somewhere about that; perhaps, however, it is prior to that.

Q. State what that interview was.

A. M'r Mowry came to the office in company with M'r John Shepley, handing me a notice of the renewal premium & with it tendering me a check in payment for renewal premium.

Q. Are these the papers?

A. That, I should say, was the renewal-notice. That, I should say, was the premium-note.

58 Q. Go on & state any other interview.

A. I at once declined to receive the premium, stating that M'r Mowry we had heard had died more than a month previous & it was not customary to receive premiums after parties had died. After some minor conversation which I am not able to state, not relevant, perhaps, to this matter, M'r Mowry I think left the office with M'r Shepley. That is the last time I saw M'r Mowry, I think, until this case came to the courts. A few days subsequently there was a package came by express, containing money for the same premium. I was not at the office at the time. It was receipted for, I think, by an individual, M'r Atwood; E. A. I think his initials are. When I returned to the office M'r Atwood handed me the package, stating what he had done. I at once told him we could not receive the package, & that there had been a check tendered for the same premium several days previous, which we had declined, & directed him to take the package back to the express office, which he did. After that I do not know anything that transpired in relation to it until the matter came before the courts.

By M'r Collins:

59 Q. How long have you been general agent of that company?

A. I was general agent about five years.

Q. You were superintendent of agencies; you were head of the concern?

A. I was manager of agencies of the New England States.

Q. Whose handwriting is that?

A. I should say that was a young man of the name of Freeman Nickerson, a clerk in the office.

Q. Not yours?

A. No, sir.

Q. When these applications came in, did they come to you?

A. They were always handed by me to the president.

Q. They came to you & were handed by you to the president, M'r Crocker?

A. Yes, sir.

Q. Do you know anything in regard to this notice; what the custom of the co. is in regard to sending notices?

A. They are always under all circumstances sent to the party insured, & not to the beneficiary unless by special request.

Q. You always issued notices ?

A. It is customary; yes, sir.

Q. Where is your place of business ?

A. It was at that time at the co's office.

Q. Where is that ?

A. Boston, Mass.

Q. Your officers are located there ?

A. Yes, sir.

60 Q. You do business in Boston ?

A. Yes, sir.

Q. What is the practice of Massachusetts companies in regard to the payment of policies after lapsing ? What is the usage of the Mass. companies in regard to the payment of premiums when they become due ?

(Excluded.)

By M'r Parkhurst:

Q. (Showing renewal-receipt to witness.) Was that in your possession at any time, M'r Childs ?

A. It was, sir.

Q. This came into your possession for what purpose ?

A. For the purpose of delivery to the party when the premium was paid, if paid at maturity. Unless it was paid at maturity, I had no authority to deliver it.

Q. The premium was to be paid to you ?

A. Yes, sir. No other individual except my assistant had any right to receive premiums in the New England agency.

By the court:

Q. You say no person in New England had any right to receive premiums except yourself after the first premiums ?

A. Unless authorized specially by myself, all the receipts were
61 made to be countersigned by myself.

Testimony of Joel W. Fletcher.

By Mr. Parkhurst:

Q. Were you in the employ of the Union Mutual Life-Ins. Co. in March, 1868 ?

A. I was connected with the New England agency at that time.

Q. You were subordinate to M'r Childs, or connected with M'r Childs ?

A. Connected with M'r Childs.

Q. Did you at any time have in your possession that paper ?

A. Yes, sir.

Q. I will ask you if you sent by mail any notice to anybody, &, if so, on what day ?

A. On the 27th of February I sent a notice to Nelson H. Mowry, of Providence.

Q. Look at that & see if that is the notice, so far as you can remember.

A. That is the notice that was sent of the renewal-receipt, filled out in my handwriting, and the premium-note is the same, in my handwriting.

Q. How long have you been connected with the company ?

A. September, 1865.

Q. Do you know what the practice of the company was in reference

to sending notices on policies like this, where the policy was
62 made upon the life of one man for the benefit of another?
A. Invariably sent to the party who was insured.

Q. Whose life was insured?

A. Yes, sir; unless there was a special request to the contrary, & that request was entered upon our register.

By the court:

Q. If a man insures the life of his debtor in order to secure his debts, do you send your notice to the debtor?

A. Unless the creditor should specially request us to send to him. I think out of 4,000 policies borne on the New England register there were not more than two or three instances where the notices were sent to other than the person insured.

Q. If a man insure a bankrupt party, an insolvent party, if he insures his life & pays the premium, do you send the notices to the bankrupt & not to the man who pays the premium?

A. That would depend upon the entry upon the register. We would follow the register so far as taking the name of the party insured was concerned, & if there was no memorandum to the contrary, we should send it to the party insured.

Q. It is not customary to insure the lives of minors & married women
& children; have you not policies of insurance on minors & such
63 people, & do you send the notices to the minors or whoever may
be insured?

A. Invariably to the party whose life is insured, unless a memorandum was made upon the register.

Q. If a man insures half a dozen minor children you send the notice to them?

A. Yes, sir.

Q. You do make arrangements to give notices to the parties?

A. Yes, sir.

Q. Do you remember going with M'r Atwood to the express office with a package in April, 1868?

A. I think I did not go to the express office when he had the package, but I went with him in relation to the package when he went a second time.

Q. Did you see the package?

A. I did.

Q. Did you examine it?

A. Not more than I saw it in his hands. I did not take it into my hands.

Q. You went with him to the office of the company?

A. The express office.

Q. State what took place there.

A. He went for the purpose of getting the receipt he had given for the package erased from the express-man's book. They declined to do
it because the package had been once delivered & receipted for.
64 He stated to them the reason why the company would not accept
the package.

Q. Were you in the office at the time M'r Childs opened the package?

A. I think the package was opened when it was brought to our desk.

Q. When M'r Childs examined it, were you present?

A. We had been out to dinner together, & came in & were both at our desks at the time M'r Atwood brought the package.

Q. State, as near as you can recollect, what the contents of the package were.

A. Papers & money.

Q. You did not count it?

A. We did not count it.

Q. Did your agency furnish in 1867, to your knowledge, to M'r Shepley any blank applications?

A. I have no knowledge that they did.

By M'r Bradley:

Q. If a party takes out an insurance upon the life of somebody else, & pays the premium himself, & agrees to pay all future premiums—if he asks you to give him notice, you would do it, would you not?

A. I should make a memorandum of that on my register.

Q. Answer my question directly.

A. I should.

65 Q. If your agent made an agreement that he would give him notice—the man that was to pay the money—do you think that would be a proper agreement for him to make?

(Objected to & excluded.)

Testimony of W. H. Hollister.

By M'r Parkhurst:

Q. Are you secretary of the defendant company?

A. Yes, sir.

Q. And were at the time the policy in question was issued?

A. Yes, sir.

Q. State what you know in reference to the receipt of any package purporting to contain the second annual premium upon the policy now in question.

A. I was not in the office, I think, at the time the package came in, but I was there before it was returned. M'r Atwood, the book-keeper, stated the case that he had receipted for a package of money purporting to be the payment of the premium on M'r Mowry's policy. I said to him I understood M'r Mowry was dead & we could not receive such money, & he must return it to the agent from whom he had received it, or the express office from which he had received the package.

66 Q. Is that the premium-note which was given as part of the payment upon this policy?

A. That was, sir.

Q. Has that ever been paid, or any part of it?

A. No, sir.

Q. That is the premium-note on the first premium?

A. Yes, sir.

(Note put in & marked "H.")

Q. Whether, to your knowledge, M'r John Shepley was furnished with any blank applications or other blanks from your office for the purpose of receiving applications for insurance?

A. Not to my knowledge.

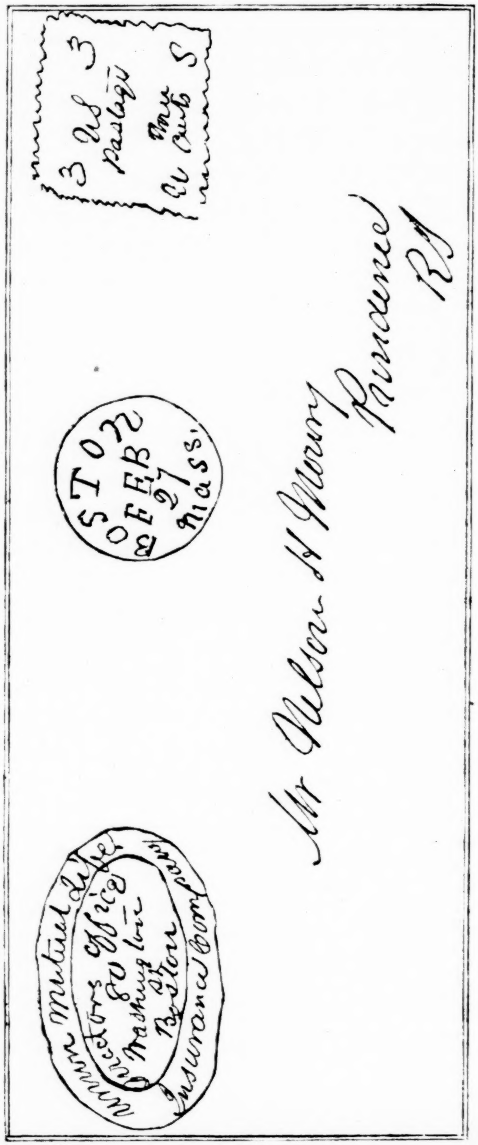
(Application put in & marked "D.")

E. F. Childs recalled.

Q. When this application was presented to you by M'r Shepley, as you stated in your direct examination, did he or not make any statement to you that he had agreed that the applicant, M'r Daniel A. Mowry, should have notice of the time when the premium became due ?

(Objected to & excluded.)

67, 68 *Exhibit marked "A."*



3 US 3
postage
Three
Cents

BOSTON
FEB
27
MASS.

Mr Nelson H Mowry
Providence
RI

Union Mutual Life Insurance Company
Directors Office
80
Washington
Street
Boston

69 *Exhibit marked "B."*

PROOFS OF DEATH.

Nelson H. Mowry. Pol. No. 20772.

Proof from medical attendant.

STATE OF RHODE ISLAND,
County of Providence, sc:

Samuel Mowry, of Providence, in the county of Providence, being duly sworn, deposes and says that he is a physician by profession; that, as such physician, he attended Nelson H. Mowry, of Providence, in the county of Providence and State of Rhode Island, in his last illness; that he was called upon to attend him on the fourth day of April, A. D. 1868, and continued with him as such until the time of his death at Providence, viz, on the eighth day of April, A. D. 1868; that the death of the said Nelson H. Mowry was not occasioned by duelling, or by the hands of justice, or in the known violation of any law of the United States, but that his death was occasioned by pneumonia.

SAMUEL MOWRY.

Subscribed and sworn to before me this 18th day of June, A. D. 1868.

JAMES C. COLLINS,
Notary Public.

70 *Proof from undertaker.*

STATE OF RHODE ISLAND,
County of Providence, sc:

W'm O. Briggs, of Providence, in the county of Providence, being duly sworn, deposes and says that he is an undertaker at said Providence; that as such undertaker he was called upon on the eighth day of April, A. D. 1868, to prepare the dead body of Nelson H. Mowry, of Providence, for burial; that he placed said body in a coffin and duly closed & fastened the lid, and that he placed said coffin containing said body in a tomb in the North burial ground at said Providence, and that said coffin was left by deponent in said tomb.

WILLIAM O. BRIGGS.

Subscribed and sworn to before me, this nineteenth day of January, A. D. 1869.

JAMES C. COLLINS,
Notary Public.

Proof of identity of party.

STATE OF RHODE ISLAND,
County of Providence sc:

Henry S. Knight and Frances W. Stearns, both of Providence, in the county of Providence and State of Rhode Island, being duly sworn, depose and say that they were personally acquainted with Nelson 71, 72 H. Mowry, of Providence, now deceased, and that the said Nelson H. Mowry was the identical person whose life was insured in the Union Mutual Life-Insurance Company under policy No. 20772, bearing date the ninth day of March, A. D. 1867, and who was therein described as Nelson H. Mowry of Providence, in the county of Providence & State of Rhode Island.

HENRY S. KNIGHT.
FRANCES W. STEARNS,

Subscribed and sworn to before me, this nineteenth day of January, A. D. 1869.

JAMES C. COLLINS,
Notary Public.

73, 74 *Exhibit marked "C."*

UNION MUTUAL LIFE-INSURANCE COMPANY.

Directors' office, 80 Washington street.

Policy No. 20772.] [Permit No. 2546

BOSTON, *April* 26, 1867.

(Without extra premium.)

In consideration of the premium received for policy No. 20772 and of the stipulations and agreements therein relative to future payments of premiums, permission is hereby given for Nelson H. Mowry (the person whose life is insured by said policy) to go to, reside in, and return from California, travelling by way of the usual travelled routes, without prejudice to such insurance, and notwithstanding any prohibition contained in said policy.

W. H. HOLLISTER, *Secretary.*

(Enclosed on an envelope stamped: "Union Mutual Life-Insurance Company. Directors' office 80 Washington st., Boston." Directed to Daniel Mowry, Providence, R. I.)

75 *Exhibit marked "G."*

BOSTON & PROVIDENCE EXPRESS.

$384.92, money package for Union Mutual Life-Ins. Co., Boston, Mass.
From D. A. Mowry, Prov., April 23d, 1868.

No. 10.] PROVIDENCE, R. I., *April 22nd*, 1868.

The National Exchange Bank of Providence. Pay to Union Mutual Life Ins. Co., or order, three hundred & eighty-four $\frac{92}{100}$ dollars.
$384.92.] DANIEL A. MOWRY, J'R.

U. S. Inter. Rev.
2 2
D. A. M., jr.
Ap'l 23, '68.
2 2
U. S. Inter. Rev.

No. 20772.

$362.00 PROVIDENCE, R. I., *March* 9, 1868.

Twelve months after date, I promise to pay the Union Mutual Life-Insurance Co., or order, three hundred & sixty-two $\frac{}{100}$ dollars, with interest at six per cent. per annum, for value received.

And it is an express condition of the acceptance of this note, by said company, in part payment of the annual premium for policy No. 20772, which condition is fully agreed to by the promisor herein, that such acceptance shall in no wise affect the condition in said policy respecting the forfeiture thereof in case of the non-payment of any other portion of said annual premium.

DANIEL A. MOWRY, J'R.

76 (Directors' office.)

UNION MUTUAL LIFE-INSURANCE COMPANY.

No. 80 Washington street.

BOSTON, *Feb'y* 27, 1868.

SIR: The annual premium of $725.10 on your policy on the Union Mutual Life-Insurance Company, No. 20772, will be due on the 9 day of March, 1868, and is payable as follows, viz:

Cash part premium	363 00
Annual interest on former notes (1)	21 72
Extra premium, permit No.	
Cash payment as above	384 72
New note for part of annual premium	362 00

☞ Please be particular to return this notice and accompanying papers when you call or send to settle.

Respectfully yours,

E. F. CHILDS,
Sup't of Agencies.

To NELSON H. MOWRY, *Providence.*

Removed to 27 Court street, Jan'y 14, 1868.

☞ If payment of premium & interest is not made to an authorized agent, or at the company's office as above, on or before the day it falls due, the policy, by its express terms, becomes null and void, and the company is under no obligation to *revive* it.

Where the company shall have no authorized agent convenient to the holder of any policy, then the amount due may be remitted by bank-draft and post-office stamps direct to this office.

77, 78 *Exhibit marked "H."*

No. 20772.

$362.00.] PROVIDENCE, R. I., *March* 9, 1867.

Twelve months after date I promise to pay to the Union Mutual Life-Insurance Co., or order, three hundred and sixty-two $\frac{}{00}$ dollars, with interest at six per cent. per annum, for value received.

And it is an express condition of the acceptance of this note by the said company in part payment of the annual premium of policy No. 20772, which condition is fully agreed to by the promisor herein, that such acceptance shall in no wise affect the condition in said policy respecting the forfeiture thereof in case of the non-payment of any other portion of said annual premium.

DANIEL A. MOWRY, J'R.

Exhibit marked "I."

Policy No. 20772.	
Annual premium, $725.00.	
Cash and notes for cash, part of premium	363 00
Interest on 1 note...	21 72
Excess of note surrendered over dividend No.	
Extra premium permit.	
Cash due........	384 72
Premium note in addition for 362.00.	

Received the above this day of , 186 .
E. F. CHILD, *Agent.*

UNION MUTUAL LIFE-INSURANCE CO. OF MAINE.

Directors' office, No. 27 Court street.

BOSTON, MASS., *March* 9, 1868.

Payment made to E. F. Child, agent at Boston, and his receipt given therefor on or before the 9' day of March, 1868, of the annual premium, interest, &c., (as per margin,) which will then become due on policy No. 20772, insuring the life of Nelson H. Mowry, shall continue said policy in force until March 9, 1869, at noon.

W. H. HOLLISTER, *Secretary.*

(Endorsed on the back:) Dead.

79, 80

C.

THE UNION MUTUAL LIFE-INSURANCE CO. OF MAINE.

Directors' office, Boston, Massachusetts.

No. 20772. Whole term of life. Annual premium, $725.00. Sum insured, $10,000.

This policy of insurance witnesseth that whereas Daniel A. Mowry, j'r, of Providence, county of Providence, State of Rhode Island, has applied to the Union Mutual Life-Insurance Company, by application dated March 9th, 1867, for insurance on the life of Nelson H. Mowry, of Providence, county of Providence, State of Rhode Island, and has also agreed to pay the sum of seven hundred and twenty-five dollars and cents as the annual premium therefor on or before the ninth day of March in every year during the continuance of this policy; and now—the first payment of the before-mentioned annual premiums having first been received by the company or their accredited agent during the life-time and good health of the said insured, as is hereinafter provided, and not otherwise, and in consideration of such payment having been so received, and of the provisions herein for future payments of premiums—the said company do hereby insure the life of Nelson H. Mowry aforesaid in the amount of ten thousand dollars, from the ninth day of March, 1867, at noon, for and during the term of his whole life, for the sole and separate use and benefit of his nephew, Daniel A. Mowry, j'r.

And the said company do hereby promise to and agree with the said assured, his executors, administrators, and assigns, well and truly to pay the said sum insured to the said assured, his executors, administrators, or assigns, ninety days after due notice and proof of the death of the said Nelson H. Mowry during the continuance and before the termination of this policy, and of the just claim of the assured or of any other person as executor, administrator, guardian, or assign of the assured under it.

Provided especially, and this policy is made and it is accepted by the assured and the said Nelson H. Mowry upon the express condition, that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void and wholly forfeited: and also that no agent of this company, except the president and secretary, can waive such forfeiture or alter this or any other condition expressed in this policy.

And in case the death of the person whose life is hereby insured shall be caused by risks consequent upon the engagement and employment of said person in a coal-mine, powder-manufactory, powder-transportation, railroad-train, or steamboat, as fireman or engineer in a steam-mill or steam-factory, as an express carrier, or in lake or river or other inland navigation, said company shall not be liable to pay the loss, unless liberty shall have been given to engage in such employment, which liberty, if applied for, shall be given for a fair additional premium.

Said insured life has liberty to go (and the risk is to continue) on any passage by water coastwise, as a passenger, along the Atlantic and Gulf coasts of the United States, New Brunswick, Nova Scotia, and Prince Edward's Island, between any of the ports or places from the entrance to the river S't Lawrence to that of the Mississippi River, with liberty to touch at any intermediate ports and at Cuba; also liberty to go as passenger (and the risk is to continue) between Europe and any of the Atlantic and Gulf coast ports within the limits above named, and to touch at the usual ports. Said insured life also has liberty occasionally to make excursions by boat or vessel on the sea coast, or on any river, lake, or pond, for health, recreation, or sporting; provided that, in case the said insured life shall die on a voyage or passage upon the high seas not permitted herein this policy shall thereupon be void and no loss be recoverable under it. Said insured life also has liberty to travel on the ordinary routes of inland travel by the usual modes of conveyance; also to reside and travel indefinitely in Europe, New Brunswick, Nova Scotia, Prince Edward's Island, and in Canada.

This policy is also made and accepted upon condition that, except as provided herein, if the said person whose life is hereby insured shall, without the consent of said company, previously given in writing, pass beyond the limits of the United States, or shall without such consent voluntarily go to remain and shall remain, or shall without such consent voluntarily and without compulsion or irresistible necessity remain, one week, between the first of June and last of October, south of the latitude of the southern boundary of Virginia, or shall without such consent voluntarily be and remain over one month in any part of the year west of the Rocky Mountains, or shall without such consent enter into any military or naval service, (the militia not in actual service excepted,) this policy shall thereupon be void. And in case he shall die by his own hand, whether at the time sane or insane, or in consequence of a duel, or by the hands of justice, or in the violation of or attempt to violate, or in consequence of violating or of attempting to violate, the laws of the United States, or of any State, country, or place, or shall become so far intemperate or addicted to any vice or habit as to seriously and permanently impair his health or induce delirium tremens, this policy shall be null and void, and the said company shall not be liable for the loss.

It is also a condition of this policy, fully agreed to by the assured and the said Nelson H. Mowry, that if the statements made by or on the procurement or behalf, or with the knowledge of the said assured, to said company as the basis of or in the negotiations for this contract, shall be found in any respect untrue, then this policy shall be null and void.

And it is also a condition of this policy, accepted by the assured therein, that in case it becomes null and void for any of the above causes or by forfeiture or otherwise, all payments of premiums made thereon, and all dividend credits accruing therefrom and remaining unpaid, and all apportionments of profits thereto shall also be null and void, and shall not constitute any claim against the company to any party.

SPECIAL AGREEMENT.—It is expressly understood and agreed, and this policy is accepted by the assured upon the condition, that if at any time any note, check, or draft (other than the usual premium note for one-half of the annual premium) shall be given in payment or part payment of any premium then due or to become due for or on account of this policy, and such note, check, or draft shall not be paid according to the provisions thereof, then this policy shall become immediately void, and the company be thereby released from all obligations under it.

Any assignment of this policy shall be void unless assented to in writing by said company.

Said company shall have a right to set off any demand they shall have against said assured, his assigns or representatives, arising incidentally to or in connection with this insurance against any claim for which this company shall be liable thereon.

In witness whereof the said Union Mutual Life Insurance Company have, by their president and secretary, signed this contract at their office, in Boston, this ninth day of March, one thousand eight hundred and sixty-seven, but the same shall not be binding until countersigned and delivered by John Shepley, agent at Providence, R. I., nor until the advance premium is paid, nor unless the party is alive and in sound health at the date of such payment.

HENRY CROCKER, *President.*
W. H. HOLLISTER, *Secretary.*

Countersigned at Providence this 13 day of March, 1867.

JOHN SHEPLEY, *Agent.*

(Edition of 1867.)

[Fifty cents (50) U. States int. rev., 50, orig'l process.] [Fifty cents (50) U. States int. rev., 50, orig'l process.]

81, 82 (Indorsed:) No. 20772. Union Mutual Life Insurance Company, office No. 80 Washington st., Boston, Mass.. Assurance on the life of Nelson H. Mowry; amount, $10,000. Dated March 9, 1867. Term of whole life. Payments annually due on March 9. Annual premium, $725.00; policy, 1.00—$726.00. C.

83 D.

UNION MUTUAL LIFE-INSURANCE COMPANY.

Statement required from persons proposing to effect assurance in this company, and which forms the bases of the contract.

1. In whose behalf or for whose benefit is the assurance to be effected?
Name at full length, Daniel A. Mowry, jr.
Residence, Providence.

Occupation, diamond jeweller.
Relationship to life to be assured, nephew.
2. Party whose life is to be assured.
Name at full length, Nelson H. Mowry.
Residence, Providence.
Occupation, manufacturer.
Place of business, cor. Pine & Richmond st.

3. Amount of assurance. $10,000, ten thousand dollars. For term of life.

4. How do you wish to pay the premium? ½ note? Yes. With profits? Yes.

It is understood that the privilege of paying premiums semi-annually, quarterly, or monthly is conceded, & will be continued only on condition that the payments are all punctually paid when due.

5. Where and when was the party born? At Smithfield, R. I. Year, 1808; month, May; day, 20; age at nearest birthday, 59 years.

6. Is the party in good health and (as far as he knows) free from any symptom of disease? Yes.

7. Is the party whose life is to be assured married? Yes.

8. Are the habits of the party uniformly and strictly sober and temperate? Yes.

9. Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium? No.

10. Has the party been vaccinated or had small-pox or varioloid? Been vaccinated; had neither.

84 11. A. Has the party been acclimated to a southerly climate? No. B. If so, when and how? No. C. Has the party had the yellow fever? No.

12. A. What employment has the party been engaged in? B. Has the health of the party suffered thereby? A. Manufacturer of soda & mineral water, cor. Pine & Richmond st., Providence, R. I. B. No.

13. Has the party ever had any of the following diseases, or (as far as he knows) any symptoms thereof:

Aneurism, fistula, gout, quinsy, apoplexy, colic, insanity, rheumatism, asthma, disease of the heart, disease of liver, rupture, bronchites, dropsy, neuralgia, scarlet fever, cancer, epilepsy, paralysis, spitting of blood, consumption, fits, palpatation, disease of urinary organs.

If party has had one or more of these diseases, please state particularly which, when, how severe, and whether fully recovered; and answer "No as to all the rest." No; not any of them.

14. Has the party had inflammatory rheumatism; if so, when and how often? No.

15. Has the party ever had desease of any vital organ? No.

16. Is the party subject to dyspepsia, dysentery, or diarrhœa? No.

17. Has the party ever had an habitual cough? No.

18. Has the party ever met with any severe personal injury; if so, what? No.

19. Has the party had during the last ten years any sickness or disease? If so, state particularly and the name of the physician or
85 physicians who prescribed or who were consulted. No.

20. Have the ancestors of the party generally reached old age? Yes.

21. Have the parents, uncles, aunts, brothers, or sisters of the party been affected with insanity, consumption, or with any pulmonary, scrofulous, or other constitutional disease, hereditary in its character? No.

22. Are the parents of the party living?

23. Are the parents of the party dead?

Father, yes. Age at death, 69. Cause of death, dyspepsia. Mother, yes. Age at death, 76. Cause of death, old age.

How many brothers has the party had?	How many are living, and their names?	At what ages?	What is the state of their health, respectively?	How many have died?	At what ages?	Of what disease did they die?
Six.	Daniel A.	70	Good.			
	Samuel.	68	Do.			
	Burrell.	66	Do.	One.	45	Dyspepsia.
	John.	64	Do.			
	Manton W.	62	Do.			
How many sisters? One.	Menty.	72	Do.			

25. Name and residence of the family physician of the party, or of any one whom the party has usually employed or consulted, and of the physician who last attended the party or was consulted. None for myself.

26. Name & residence of an intimate friend. Francis N. Stearns, Providence, R. I.

27. What amount is now assured on the life of the party, and in what company or companies. $10,000, (ten thousand,) Home Life, N. Y.

28. Has the company ever declined to issue assurance on the life of the party; if so, what company? No.

29. Is the party & the applicant aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the health, habits, or circumstances of the party to be assured, will vitiate the policy and forfeit all payment thereon? Yes.

86 (Signed) N. H. MOWRY.
DANIEL A. MOWRY, JR.

In presence of—
W'M T. SHEPLEY.

I hereby certify that I am acquainted with the party whose life is proposed for assurance by this application; that I have carefully read the answers to all the questions contained in the application and the certificates annexed and believe them to be correct, and that the health & habits of life of the party are and have been such as to make the life safely assurable.

JOHN SHEPLEY,
Agent at Providence.

Declaration and agreement to be signed by or for the party in whose behalf or for whose benefit the life is to be assured.

I, Daniel A. Mowry, j'r, of Providence, county of Providence, State of Rhode Island, the person named in this application and declaration, being desirous of effecting an assurance with the Union Mutual Life-Insurance Company in the sum of ten thousand dollars upon the life of Nelson H. Mowry, of Providence, county of Providence, State of Rhode Island, the individual described in this application, during the term of life, do hereby declare that his age at nearest birthday is 59 years; that he is in good health, free from any symptom of disease, and does usually enjoy good health; that he is not now and has not been
87 addicted to habits of intemperance, or other vices tending to shorten life, and that the preceding answers and annexed statements are full, correct, and true, in which is not concealed or withheld

any circumstance in relation to the past or present state of his health, habits of life, and condition which may render an insurance on his life more than usually hazardous, or with which the directors of said company ought to be made acquainted. And that I have an interest in his life to the full amount of the sum aforesaid.

And I agree that the assurance hereby proposed shall not be binding on said company until the premium thereon shall be actually secured by said company or an accredited agent thereof, in the life-time of the said Nelson H. Mowry, and that it shall not continue in force in case of default in the payment of any note or notes which may be given in part payment of premiums thereon.

And I further agree that the preceding answers given to the annexed questions and the accompanying statements and this declaration shall be the basis and form part of the contract or policy between me and said company; and if the same be not in all respects full, true, and correct, the said policy shall be void, and all moneys which may have been paid on account thereof shall be forfeited to said company.

Dated at Providence this ninth day of March, 1867.

(Signed) DANIEL A. MOWRY, JR.

In presence of—
W'M S. SHEPLEY.

88 *Questions to be answered by the friend of the party to be assured.*

1. How long have you known the party whose life is herein proposed for assurance, and who refers to you in the foregoing application as an intimate friend? About six years.

2. A. Do you know or believe that the habits of life of the party are uniformly and strictly sober and temperate? Yes. B. Have they always been so? As far as I know.

3. Is the party's mode of life active or sedentary? Active.

4. Have the party's parents, uncles, aunts, brothers, or sisters, to your knowledge, been afflicted with mental derangement, pulmonary complaints, or any constitutional or hereditary predisposition to disease that tends to shorten life? I do not know.

5. Do you know or believe that the party has been afflicted with any serious disease? No.

6. Do you know or believe that the party has been afflicted with any mental derangement? No.

7. Do you believe that the constitution and the habits and circumstances of the party are such as to render the life safely assurable? Yes.

(Signed) FRANCES N. STEARNS.

Dated Feb'y 20th, Providence, 1867.

89 *Questions to be answered by the physician of the party to be assured.*

(Certificate of family physician not required.

W. H. TRAVERS, *M. D.*)

Questions to be answered by the medical examiner of the company.

The medical examiner may put such other questions bearing upon the case as he may think proper, making the whole examination in the most thorough, exact, and circumstantial manner.

The rates of assurance are predicated on sound lives, and none other must, under any circumstances, be recommended.

Please answer No. 14, yes or no.

Please examine the annexed application with care before examining the party, and note in your certificate any points alluded to which you deem important.

1. Name and residence of person examined. Nelson H. Mowry, Providence, R. I.

2. Please state each of the following particulars as fully and exactly as possible. Weight, 180; height, 5 f't 9 in.; circum*stances* of the chest, ordinary state, 40; expanded, 42½; figure, good.

Is the general appearance that of health & vigor? Yes.

Hair, grey. Eyes, blue. Color, white.

Is the complexion clear & healthy? Yes.

Is the muscle hard & strong? Yes.

90 Is the flesh hard? Yes.

Are the bones large or small? Large.

3. Does auscultation and percussion of the chest indicate that the heart and respiratory organs are in a healthy condition? Yes.

4. Is the respiratory murmur clear and distinct over both lungs? Yes.

Is the character of the respiration full, easy, and regular? Yes.

Are the organs of respiration free from any signs or symptoms of disease? Yes.

5. Is the character of the heart's action uniform, free, and steady? Yes.

Is the rythm regular & normal? Yes.

Are the heart & blood-vessels free from disease? Yes.

6. State the rate and other qualities of the party's pulse. 80 in standing posture; 76 in sitting posture. Normal.

Is it uniform, regular, & steady? Yes.

7. Is the party habitually free from any tendency to cough, expectoration, difficulty of breathing, or palpitation? Yes.

8. Are the functions of the brain, the muscular and nervous system, in a healthy state? Yes.

Has vaccination been so recent & effectual as to be a protection? Yes.

9. Are the abdominal organs in a healthy state and free from any tendency to disease? Yes.

Are the functions of the kidney, bladder, and other urinary organs in a healthy state and free from any tendency to disease? (Please
91 apply the tests if there is any reason to suspect disease of the kidneys.) Yes.

10. Is the party exempt from any predisposition, either hereditary or acquired, to any local or constitutional disease? Yes.

11. Do you believe the party to be uniformly & strictly sober and temperate in all the habits of life? Yes.

12. Have the party's parents, brothers, & sisters been exempt from pulmonary or other disease hereditary in their nature? Yes.

13. Has the party ever had severe injury or illness? No.

If so, has it had any effect on the constitution?

14. Do you consider the applicant's life safely assurable? Yes

Do you recommend that a policy be granted? Yes.

Dated March 9, 1867.

Please have the party attach his or her signature hereto in your presence.

Signature of the party examined: Nelson H. Mowry.

(Signed) W'M H. TRAVER, M. D.,

Medical Examiner of Home Life-Insurance Co. at Providence, R. I.

92 (Endorsed on the back of the application:) Policy No. 20772. Union Mutual Life-ins. Co. of Maine. Directors' office, 80 Washington st., Boston, Massachusetts. Date of policy, March 9, 1867. Sum assured, $10,000. Terms, life. Proposer, Daniel A. Mowry, j'r. Life of Nelson H. Mowry. Occupation, manufacturer. Residence, Providence, R. I. Date of application, 9 March, 1867. Age, 59. Premium, $725.00. Agent, Childs J. Shepley. Medical examiner, W. Traver. D. N. B.—The agent is requested not to fill up the above blanks.

93 *Charge to jury.*

MR. FOREMAN & GENTLEMEN OF THE JURY:

This action is brought upon a policy of insurance effected by Daniel A. Mowry, the plaintiff, upon the life of one Nelson H. Mowry, who was his uncle, his relative. There is very little of conflict in the testimony in the cause, the princip*le* facts in the case which go to make up its history being *i*ndisputed.

It appears that in the year 1867 & prior to the 13th of March, 1867, one John Shepley, residing in Providence, represented himself to Mowry to be the agent of the Union Mutual Life-Insurance Company, a corporation having its place of business in Boston, in the Commonwealth of Massachusetts, & whose business it was to effect insurance upon lives. Representing himself to be the agent of that corporation, he solicited the plaintiff to effect insurance in that company; that accordingly an application was made, which application is introduced in evidence here & will be before you, by Daniel A. Mowry, the plaintiff, upon the life of Nelson H. Mowry, his uncle.

94 It appears in evidence that the plaintiff was interested in that life from the fact, in the first place, that he was a creditor to the amount of about $6,000 of the person upon whose life the insurance was effected, & also that he had, according to the testimony, agreed to embark with him in an enterprise requiring considerable capital, & dependent, according to the testimony, upon the knowledge & skill in the business of the person whose life was to be insured. I instruct you, for the purpose of this trial, that that is sufficient insurable interest to prevent this from being a mere wager policy, & it is not material whether or not that interest was a' great as the amount of insurance which he effected upon the life of the party. That application was presented at the office of the co., there being up to this time no evidence, & there being in the case no evidence as to whether, in point of fact, John Shepley was, at that time, the agent of the defendant insurance company or not, the only evidence being that he had represented himself to be the agent, & that the company issued the policy upon such other application, & then that the company issued a policy upon this application.

95 That policy makes the application a part of the policy, & in the application & on the margin of it you will find that Shepley represented himself as the agent of the company, & signed as the agent of the company. You will find also from the testimony, & it appears also from the testimony, that the first premium was paid to Shepley, & that the policy itself on its face acknowledges that the payment of that premium was to an accredited agent of the company, & it also says at the bottom of the policy that it is not to be binding until countersigned by John Shepley, agent, & it was countersigned by John Shepley, agent, before it was delivered.

The burden in this case is upon the plaintiff to show you that Shepley was the agent of this co., & he undertakes to prove that by showing that he represented himself as the agent; that he contracted with this party, entered into a contract with this plaintiff, under such representations, which contract was approved & ratified & entered into by the principal for whom he presumed to act, acknowledging him as agent.

96 There is no evidence, that I am aware of, in the case tending to show in any way any limitations of that agency. The company defendant does not come here & undertake to show that there was any lithe agency, any agency under the seal of the corporation, & a specific & limited agency conferred upon this party.

It does not undertake to prove that Shepley was an agent with limited powers, only to receive applications & to issue policies & to deliver policies issued by the co., but not to effect insurance.

The company has introduced no evidence, that I am aware of, that I recollect, as to the extent or the power of that agency, any further than simply this ratification of his acts, in which they recited in general terms that he was the agent of the company.

The premium was paid & this policy was issued, & there is no question made in this case but what this policy originally attached & was a valid contract, binding both upon the assured & the insured. A year's
time elapsed, & then by the terms of the policy & its conditions,
97 which you will find upon the face of the instrument, it became incumbent upon the party effecting that insurance to pay another year's premium, the annual premium which was payable at the commencement of another year of the duration of the policy.

There is no question but what that time passed without the payment of that premium, and accordingly the defendants in this case, as the death occurred not long afterwards & claim was made upon the policy, declined to pay upon the ground of this provision, which is one of the conditions, & binding conditions, in the contract:

"Provided especially, & this policy is made & it is accepted by the assured & the said Nelson H. Mowry upon the express condition that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day & in the manner so provided for, then this policy shall be null & void, & wholly forfeited. And also, that no agent of this co., except the president & secretary, may waive such forfeiture, or alter this or any other condition in the policy."

Independent of that condition, probably, in the policy it would
98 not have been considered so far an element of this contract but what within a reasonable time after the premium became due the party might have made his payment, & the contract would still have been binding; but by the terms of that condition the time of payment is made material, & the parties have agreed, by a condition which is operative & binding upon both, that a forfeiture of that contract shall take place if the payment be not made on the day provided for by the contract. Although it was a valid contract, operative and binding between both parties before, & although the party had agreed to pay at that time, & the company had agreed if he did pay the policy should continue & be binding, yet they also agree if it is not paid on the day when that payment becomes due, that then there shall be a forfeiture of all sums theretofore paid, & that the policy shall become void.

I call your attention to the fact that this is a forfeiture, because some principle' of law which I shall have occasion to state to you hereafter in the course of this charge are applicable to cases of forfeiture differently, & in a different sense, and in a different extent from what they

99 would be applicable under other conditions & under other elements of contracts.

The company, relying upon this defence, then, of a forfeiture of the policy because the money was not paid upon the day when it was due, although the party died upon whose life the insurance attached, the plaintiff replies, "True, this was not paid upon the day & according to the terms of the policy;" but still he claims that this policy is operative & binding upon the corporation, because he says that the corporation, through its agent, had agreed with him to notify him when that payment became due before it became due, & had neglected to comply with that condition; & he claims that that first was an element of the contract itself, & controlled the terms of the policy itself. It is denied, on the other hand, that Shepley was the agent of the corporation to make any contract whatever. Before considering what the effect of such an agreement would be if it had been made by the company, you are first to consider whether Shepley was the agent or not of the company for the purpose of making such a statement as he did make, & whether or not it is to be considered the statement of the company.

100 In the first place, as I have before stated to you, it is incumbent upon the plaintiff to prove their agency. That he was an agent of the company to some extent is admitted by the recitals in the policy; that he was an agent of the company to receive this application for this insurance is admitted by the recitals in the policy itself which is issued by the corporation.

It is claimed on the part of the corporation that his agency extended no further than that. There the burden shifts. The burden having been upon the plaintiff in the first place to prove the agency of Shepley, and then the corporation having recited that he was their agent, after he had so represented himself; if you find the proof to be as it is in my recollection, that his representation was simply of a general nature, (the witness said "he came to me & represented himself to be the agent of the company,") if he did so represent himself to be the agent of the company & if the ratification & acknowledgement of that agency was as general as the representation which he made of his agency; that
101 is, simply, that he was the agent of the company; if that agency was any more limited than that, then the burden is on the company to show not only the limitation, but that knowledge of the limitation of the agency was brought home to the party with whom the man was making the contract which was assumed by the corporation; & if you find that there is any evidence in this case of any limitation of his agency which made it less than that which he represented, which was simply that he was the agent of the company, & that that knowledge was brought home to the party with whom he was acting before the policy was issued, why then his agency is to be limited to that extent to which a knowledge of the limitation was brought home to the party with whom he was acting. Otherwise, for all purposes within the scope of that business which he undertook to do, which was entering into the contract of insurance to the extent of that business which he undertook to do, & that contract which he undertook to make, his agency would be general as he represented it.

Great ingenuity has been exercised by insurance corporations in
102 the attempt to establish agencies throughout the country & have a general system of agencies & sub-agencies, & to have agents under their employment & pay, but yet to stipulate that they should be the agents of the adverse party, the party applying, & not the agents

of the company. Upon very few subjects of contract has so much of professional skill & ingenuity been expended as in the attempt to make the man who is agent of a corporation & is paid by them the agent of the other party with whom he acts, & not the agents of the corporation which employs him & pays him. It has been very unsuccessful, because it is very difficult to accomplish such a result.

A corporation being impersonal acts only through the hands of its agents, & those hands of the agencies of the impersonal corporation, just as my hand is the agent & instrument of that impersonal essence within me which constitutes my being, & when I can by a contract stipulate that this hand which makes effective the operation of my will is not the agent of that will, it probably will be competent for insurance
companies or corporations to contract that the hands which exe-
103 cute the will of that impersonal thing called a corporation are
not its agents, although they are under its pay & do its work.
But it is equally difficult to accomplish it in one case as in the other, & therefore the courts have held, & more & more every day are holding more rigidly, that the man who is really the agent & under the pay of the corporation is to be considered within the scope of that agency for which they employ him—the agent of the employer & not the agent of the party with whom he is contracting in behalf of the employer.

If, therefore, you should find in this case that this man, whether he was or not originally the agent of this company, assumed to be the agent & they ratified such assumption of power & received the benefit of it, and entered into the contract which this man undertook to make in their behalf, & if you should therefore come to the conclusion that for the purpose of making that application & doing those acts & entering into that contract he was the agent of the corporation that has ratified his acts & described him as their agent, then comes the important consideration in
this case: what is the effect upon this contract, & what is the effect
104 upon the rights of these parties of those acts which are alleged to
have been done by the agent?

If you find that he was not the agent to do any of those things, there is an end of the case. If, however, you should find that such things as are relied upon in this case as having been done by him as agent were done by him as agent, & that therefore they are to be considered as the acts of the corporation, you will consider them precisely as if the conversation which had taken place with the agent, the contracts, promises, or whatever they are, which are relied upon, were the acts of the corporation itself.

What are they which are relied upon in this case to save the forfeiture which would have taken place according to the condition in this contract which I have read?

It is contended that the agent made an arrangement that Daniel A. Mowry, the plaintiff, should be notified of the maturity or coming due of the annual premium before the time, so as to give him an opportunity to pay it. I am now hereafter to consider this as if his acts bound the
company. Such as they were, the words relied upon, the acts re-
105 lied upon, are these: According to the testimony, M'r Daniel A.
Mowry says himself that M'r Shepley, who professed to be the
agent of the company, said to him he need give himself no uneasiness about this payment: that the company would notify him. Another witness, M'r Knight, who was present, used substantially the same language in his account of what took place at the conversation between the parties.

I will read you the exact language which the witness gave, because that is what is relied upon in this case. M'r Mowry himself says:

"He represented that he was agent of the company & solicited this policy, & was there several times to see me at my place of business. I told him my uncle talked of going to California. He said it would not make any difference whether he went to California or not. He also stated, in case I took it out, that I should be notified when the premium became due. He said it would not make any difference whether he went to California or not, but that the company would notify me in season to pay the premiums."

That is the way it is stated by the plaintiff, & that is affirmed
106 substantially by M'r Knight. Both of them say, however, that
this language was used by Shepley before the policy was effected.

After that language was used & after that conversation took place the written contract was entered into between the parties, & that written contract provides that it should be void if the annual payments were not made on the day & at the time agreed upon, & that was subsequent to this conversation, & therefore, so far as reliance is placed upon this as a charge in consequence of what was said in words, by parol—that is the legal expression, that is, what is verbally said—so far as that is relied upon as an agreement in words, before the making of the written instrument, to change the terms & conditions of the written instrument, & so far as the claim is based upon that, I instruct you that the words of the written instrument, the contract, are not in any way modified or controlled by any verbal ageement as to those conditions which was made before.

But there is another ground, & that is the ground upon which, if any, the plaintiff would be saved from the forfeiture, or the ground upon
which he claims he is saved from the forfeiture, & that is what
107 is called an estoppel en pais, & that means simply some act which
a party has done by a proceeding, not by deed, nor by instrument, not in words, but some act which the party has done which disables him from setting up a defense he otherwise would have.

That is what an estoppel is. It prevents a party from proving something which exists, & which, if it were not for this estoppel, he would be able to prove. I will give you an instance of an estoppel by which you will understand very readily & easily what the effect of that is. You convey to-day to one of your fellows a piece of land to which you have no title; you don't own it; you convey it to him by warranty deed & he has your deed. Five years hence you buy that lot of land of somebody else & you acquire a title to it, & then you claim as against this party to whom you have conveyed it. If it were not for the estoppel it would be very easy for you to prove when you conveyed it to him you had no title, & therefore he took no title, & if you were at liberty to prove that fact, if that fact existed, it would show that he took no title
to the land because you had no title to give him; yet as between
108 you & him the court says you shall admitted to prove that fact,
that you had no title & that you had not acquired a title subsequently by reason of that estoppel, which prevents you from showing you had no title, & he holds the land.

That is, this estoppel operates to prevent you from proving the fact which did exist, because it would be inequitable & wrong for you to prove it or take advantage of it. That is what the estoppel is. That is what it is substantially, if there be any estoppel in this case, & that is not that this written contract is modified by the words which were spoken & form no part of the contract.

And there may be such a case, & it is for you to consider whether this be or be not the case. There may be such a case as will prevent a party from introducing in evidence and relying upon the evidence of something in his contract that apart from that estoppel would constitute a good defense & would avail. It does not change the contract itself, but it prevents a man from relying upon that contract to make out his case.

Now that is the claim which is set up here. The claim is *w*hat this com-
pany through its agents made such representations to Mowry,
109 the plaintiff, that he, relying upon those representations, failed to
do the acts which prevented this policy from lapsing & becoming
forfeited, because he relied upon certain representations; and they claim if such representations were made & that he relied upon them, & in reliance upon them failed to make the payments provided for by the terms of the policy, then that the company is estopped from setting up that forfeiture which is provided for by the policy, by reason of his having relied upon these representations & thereby failed to make the payments.

Now that is the princip*le* question for you to consider in this case, & you must look at the testimony carefully & see what the representations were, & whether they were or not of such a nature as would estop the corporation, the insurance company, from relying upon the conditions in the policy which are binding upon the parties.

What is the representation which they say this company through its agents made? The words I have read to you: "He said it would not make any difference whether he went to California or not, I should be
notified when the premium became due." He does not say in
110 terms that the company agreed if he was not notified he should
ex*h*onerated from paying, but he says "that I should be notified when the premiums became due."

Now it is for you to determine, as a question of fact, what the company meant that their insured should understand, & what he did understand; what the one party meant that the other should understand, & what the other party did understand from that language that was used. Did the agent mean to say, "Although you agree to pay this annual premium, still you shall not be held to pay this premium until you get your notice?" Did he mean to make that, & did he give the other party to understand that that was an element of the contract which entered into it, & that he had a right to rely upon this notice & was not bound to make his payment until he got this notice; or did he simply mean to state & give the other party to understand that he was stating what was the usage of the company, what they would do, or what was their habit independ-
ent of its being an element of the contract?

111 If, for instance, you were to give a note that was payable ninety
days from date & the bank officers should tell you that you would
receive a notice before that note became due, would you from that understand that you were at liberty to delay the payment of the note until you received the notice?

But there is another element to be taken into consideration here, in which this differs from the case which I have put to you in regard to the payment of the note at the bank, & that is the element of forfeiture which distinguishes this case in one respect from that which I have given to you by way of illustration, & that is, if connected with the giving of that note at the bank you had made a mortgage of personal property wherein the title would become absolute from the non-payment of the note at the time, & then the bank should say to you that they would give you notice when that became due, & you, relying upon that, did not make the payment, when the payment became due, & they set up the forfeiture or that the title became absolute, although it did not release you from the payment of that note on the day it became 112 due, yet if they set up that the title to the property mortgaged became absolute by way of forfeiture upon that day, it would render it incumbent upon you only to show that they made such representations to you as authorized you to rely upon the fact that they would not insist upon that forfeiture unless they complied with that condition, & you are to consider this in reference to the state of facts as applicable here as well as the other.

That is, if the corporation has set up a forfeiture under this condition, & not the mere fact that the man was released from the payment, the question is not whether he was released from the payment of his installment, but whether the non-payment of that annual installment on the day worked a forfeiture; & it requires a little more proof to make out a forfeiture than it does to establish some other matters.

Now look at this language carefully which was used by these parties, & see precisely what they fairly understood on both sides by this statement which was made. If this statement was a mere statement, if it was so understood; if it was a mere statement that the 113 corporation usually gave a notice, if he only stated this as a matter of information to him, "The corporation gives the notice; the corporation will notify you; that will not make any difference; the corporation will notify you"—if he merely stated that as a matter of information as to the course of dealing or habit of the company, why, then, it was no element of the contract.

But if you can find here, from the testimony in the case, that there was in the language which he used, or that there could be reasonably deduced from the language which he used, a contract between those parties that he should have that notice before he should be required to pay that installment & before that forfeiture for the non-payment of the annual premium should be insisted upon; if the agent made such contract as that in behalf of the company, & the plaintiff considered him to have made it & assented to it, & there was a perfect agreement between these parties that the one party was to have the notice & should not be required to pay until he got the notice; if that was the agreement entered into between the parties, & there is any evidence in the case from which you can find there was such an agreement entered 114 into between the parties, then I instruct you, if Shepley was the agent of the company, upon the principle I have stated to you, if you should find him to be the agent of the company, that such an agreement would estop the corporation from setting up the forfeiture because the payment was not made at the time.

But such a contract is not to be inferred; such a contract is to be proved, if relied upon. An estoppel is a thing which must be clearly proved against a party, because it deprives him of setting up a right which he has under his contract, & he is not to be deprived of that upon inference or guess, but upon positive proof; & if you should find any proof of that kind in this case, that such a contract as that in behalf of this corporation was entered into between these parties, not only that he should have such notice, but that he should not be called upon to pay until he had that notice, & that the forfeiture should not attach until he had it; if that was what the parties agreed upon at the time, while that would not modify the contract itself it would have the effect to prevent the corporation from setting up that forfeiture & avail-

115 ing itself of that which is an element in the contract. But that must be established by proof, & the burden is on the party setting it up to clearly make it out & establish it to your satisfaction.

I have been requested to instruct you—

First. That it is the duty of the plaintiff to prove that the agent Shepley had authority to make a binding agreement for the company that the plaintiff should receive notice of the falling due of annual premium before the plaintiff can claim any advantage from the circumstance that no notice was in fact sent to him.

I give you that instruction.

Second. That the fact that John Shepley had authority to receive an application for insurance & to receive the premium & to countersign & deliver the policy, does not imply an authority to make any agreement binding on the defendant company to the effect that notice should be sent to him of the time when future premiums were falling due, which would relieve the plaintiff from the obligation to pay such premium according to the terms of the policy.

I give you that instruction. If he was the agent to receive the application, &c., that would not be sufficient.

Third. That although the jury may believe that John Shepley
116 did make an agreement that the notice of the maturing of future premiums should be sent to the plaintiff, the plaintiff is not thereby relieved from paying the premiums at the time stipulated by the policy in case notice is not sent to him.

I decline to give you that instruction. The third is refused because it is conditional upon what he was.

Fourth. That it is no part of the contract between the parties under this policy that notice should be sent of annual premiums maturing.

I give you that. I have already said that it is no part of this contract, & this contract is not modified or controlled by any parol agreement between the parties.

Fifth. That a general usage on the part of the company to send such notice to the assured creates no right on the part of the assured, or any beneficiary under a policy, to require such notice as a condition precedent to the obligation to pay the premium.

I give you that instruction. General usage on the part of banks to notify the people who have notes becoming due, when the notes become due, creates no obligation whatever on the bank to give such
117 notice, & does not release the party from paying. And the practice of this insurance co., if it had any such practice or usage, as it appears to have had, to notify parties before their premiums became due that they were becoming due, does not give a party the right to require such notice as a condition precedent to the obligation to pay the premium. He is just as much under obligation to pay his premium if he don't get a notice as if he does, so far as relates to the general usage, anything growing out of the general usage of the company, unless they have made some specific agreement with him.

Sixth. That the contract between the parties is the policy of insurance issued upon the application, & the said contract cannot be altered or modified by proof of any parol agreement made by the parties prior to the issuing of the policy which is inconsistent with the terms of such policy.

That I have already given.

Seventh. That although the jury may find that as to the assured the representations of Shepley were as binding as if made by the president

or secretary or other fully-authorized agents of the company, then in
order to warrant a verdict for the plaintiff the jury must find—
118 1st, That the representations went to the extent that notice of
maturing premiums should be in fact given to the plaintiff; and

2nd. That the representations went to the extent that until notice was given that premium need not be paid.

That I have given. I have already stated to you expressly, & I repeat it, that it is necessary to show that he agreed that this notice should be given, & that until that notice was given he had a right to rely upon that notice being given, & need not pay his premiums until it was given. It is necessary that they should make out & establish that in order to make the case.

Mr Thurston also requested the following instructions—

That the defendant company by recognition of Shepley as their agent, by the fact that they received the application bearing his certificate as agent & issuing the policy requiring the same to be countersigned & delivered by Shepley as agent, are not to be presumed to have recognized or affirmed any contract or representation made by Shepley in reference to the subject of giving notice as to maturing premiums not
brought home to the knowledge of the company.
119 Judge SHEPLEY. I decline that.

Mr. Thurston also requested the following: That there is no evidence in the case tending to show that the representations of Shepley, at any interview with the plaintiff before the issuing & delivery of the policy of insurance, went to the extent that the company should give notice to the plaintiff of maturing premiums as a part of the contract between the insurer & assured, not any evidence tending to show that the contract went to the extent that the premiums should not be payable without prejudice to the policy until after notice to the plaintiff that such premiums were payable.

Judge SHEPLEY. I will read you all the evidence there is upon that subject: but, as I understand that request, I shall probably not at present, unless I find something upon reading the testimony, give you as a conclusion of law the result of it, because I consider it is rather for you to determine what this proves as a fact. I have already told you, & if you do not clearly understand it I will make it clear, what it is necessary for the party to prove. I have given you instructions which cover
the whole ground of what, as a matter of law, it is necessary that
120 the party should prove in order to make out this estoppel. What
as a matter of fact he does prove is for you to determine upon the evidence of the case, & I will read that again to you that you may not misunderstand.

The only evidence in the case upon that subject is this: "He said it would not make any difference whether he went to California or not. He also said in case I took it out I should be notified when the premiums became due. He said it would make no difference whether he went to California or not, & that the company would notify me in season to pay the premium. I need have no uneasiness about the matter at all: I should be notified in time from the company in Boston.

"Question. Was this before or after taking out the policy?

"Ans. This was before."

The counsel repeated that evidence to the witness, and the witness then says:

"Yes, sir; he said I should have due notice when the premiums became due, & in time to send on to the company in Boston; that the company in Boston would notify me. Those were the words he used."

That is all the testimony that comes from M'r Mowry. M'r Henry S. Knight said he was present, & the language he used is this—
121 I took his words exactly, making quotation-marks—M'r Shepley told the plaintiff "he need not give himself any uneasiness, as the company would notify him."

Mr. THURSTON. I also ask your honor to instruct the jury that, assuming the conversation & representations between Shepley & the assured to be as stated in the evidence that your honor has just read, that the circumstance that after such conversation a written policy was accepted by the assured from the insurance company, inconsistent with such representations upon its face—that such a fact is a proper circumstance for the jury to consider in reference to the fact that any such representations, if made, were waived by the assured.

Judge SHEPLEY. I believe I have covered that whole ground. The fact that a subsequent agreement was entered into by the parties stipulating for payment at a given time is conclusive upon that subject so far as the question of the modification of the contract is concerned.

M'r Thurston asked the following instruction:

That the estoppel in pais working through an alleged agent cannot exist as against the principal without notice of the fact upon which the estoppel rests being brought home to the principal.

122 Judge SHEPLEY. It depends entirely upon the extent of his agency. If he is a general agent, agent with general power as to the particular transaction, then his acts are the acts of the principal, & the same thing which would estop the principal, if said by himself, would estop him, if said by the agent, within the scope of that agency.

M'r THURSTON. The point to which I wished to direct your attention was that the doctrine of estoppel in pais does not apply to the case as affecting the principal, unless the fact upon which he is alleged to be estopped is actually brought home; that there cannot be an estoppel in pais by implication.

M'r BRADLEY. I desire your honor to instruct the jury that no precise form of language is necessary to make an engagement by the agent; that notice should be given by the company, & until such notice he need not pay.

Judge SHEPLEY. I think I have already instructed you upon that point.

You will now retire and take this case into consideration
123,124 under the instructions I have given you. If you find for the plaintiff, you may find for the plaintiff generally, & by agreement of the parties the sum will be fixed. If you find for the defendant, it will be sufficient for you to find a general verdict for the defendant.

125 And the said jurors, after hearing the testimony in said cause, and the arguments of counsel thereon, and the presiding judge's charge to the jury, returned the following verdict; which was duly affirmed:

Verdict.

The jury find that the defendant did promise in manner and form as laid in the plaintiff's declaration, and assess damages for the plaintiff in the sum of eleven thousand eight hundred and thirteen dollars and thirty one cents.

(Signed) HENRY B. EDDY, *Foreman.*

Exceptions were taken by defendant, before the verdict was rendered, to the charge and instructions of the court to the jury.

And on the 16th day of June, 1875, the following judgment was entered as of the twenty-first day of November, 1874:

Judgment.

It is considered by the court here that the plaintiff have and recover of the defendant corporation the sum of eleven thousand eight hundred & thirteen dollars and thirty-one cents debt, and costs of suit taxed at .

126,127 *Petition for writ of error.—Filed June 16th,* 1875.

To the honorable George F. Shepley, judge of the circuit court of the United States for the first circuit.

Respectfully represents the Union Mutual Life-Insurance Company that at the November term of the circuit court of the United States for the district of Rhode Island, holden at Providence, on the 16th day of November, A. D. 1874, the above-entitled cause came on to be heard before the court and a jury, in which cause the jury, on the 21st day of November, A. D. 1874, returned a verdict for the said plaintiff for eleven thousand eight hundred & thirteen dollars and thirty-one cents debt, and costs of suit taxed at .

And your petitioners represent that, in their opinion, errors in matter of law were committed by the court in its instructions to the jury in said cause, which are especially assigned in the bill of exceptions herewith tendered.

Wherefore they pray that a writ of error may be allowed and said cause be removed to the Supreme Court of the United States for the correction of the errors assigned.

UNION MUTUAL LIFE-INSURANCE COMPANY,
By BENJ. F. THURSTON & CHA'S H. PARKHURST,
Their Attorneys.

Allowed, and let a writ issue.
June 16th, 1875.

JOHN P. KNOWLES,
District Judge of R. Island.

128 *Bond.—Filed June 16th,* 1874.

Know all men by these presents that the Union Mutual Life-Insurance Company, a corporation duly incorporated by the legislature of the State of Maine, as principal, and George W. Hallett, of Providence, in the State of Rhode Island, as surety, are holden and firmly bound unto Daniel A. Mowry, j'r, of Providence, in the State of Rhode Island, in the full sum of twenty-five thousand dollars, to which payment, well & truly to be made, the said Union Mutual Life-Insurance Company does bind itself, its successors and legal representatives, jointly and severally, with the surety above named, who binds himself, his heirs, executors, and administrators, jointly and severally, with said Union Mutual Life-Insurance Company, its successors and legal representatives, firmly by these presents, sealed with the seal of said Union Mutual Life-Insurance Company, affixed by Henry Crocker, the president thereof, who has been specially authorized so to do, and sealed with the seal of the above-named surety, and dated this twenty-third day of November, in the year eighteen hundred and seventy-four.

Whereas lately at a circuit court of the United States, holden at

Providence, within & for the district of Rhode Island, on the 16th day of November, A. D. 1874, on a suit depending in said court between 129,130 the said Daniel A. Mowry, j'r, plaintiff, and the said Union Mutual Life-Insurance Company defendant, judgment was rendered against the said Union Mutual Life-Insurance Company for the sum of eleven thousand eight hundred & thirteen dollars and thirty-one cents debt, and costs of suit taxed at .

And the said Union Mutual Life-Insurance Company having obtained leave to remove said cause to the Supreme Court of the United States upon a writ of error, and filed a copy of said writ in the clerk's office of said court, to reverse the judgment on the aforesaid suit, and a citation directed to the said Daniel A. Mowry, j'r, citing and admonishing him to be & appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Union Mutual Life-Insurance Company shall prosecute the said writ of error with effect, and answer all damages and costs, including just damgae for the delay if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION MUTUAL LIFE-INSURANCE CO.,
By HENRY CROCKER, *President.* [SEAL.]
G. W. HALLETT. [SEAL.]

Approved.

G. F. SHEPLEY,
U. S. Circuit Judge First Judicial Circuit.

131 Circuit court of the United States for the district of Rhode Island.—November term, A. D. 1874.

DANIEL A. MOWRY, J'R,
vs.
UNION MUTUAL LIFE-INSURANCE COMPANY.

Bill of exceptions.—Filed June 16th, 1875.

Because the defendant corporation requested the court to instruct the jury as follows:

First. That although the jury may believe that John Shepley did make an agreement that notice of the maturing of future premiums should be sent to the plaintiff, the plaintiff is not thereby relieved from paying the premiums at the times stipulated by the policy in case notice is not sent to him.

Which instruction the court refused to give upon the ground that it was conditional upon what he (Shepley) was.

Because the defendant corporation requested the court to instruct the jury as follows:

Second. That the defendant company, by the recognition of Shepley as their agent, by the fact that they received the application for insurance bearing his certificate as agent and by issuing the policy requiring the same to be countersigned and delivered by Shepley as agent, is not to be presumed as having recognized or affirmed any contract or representation made by Shepley in reference to the subject of giving notice as to maturing premiums not brought home to the knowledge 132 of the company.

Which instruction the court refused to give:

Because the defendant corporation requested the court to instruct the jury as follows:

Third. That there is no evidence in the case tending to show that the representations of Shepley, at any interview with the plaintiff before the issuing and delivery of the policy of insurance, went to the extent that the company should give notice to the plaintiff of maturing premiums as a part of the contract between the insurer and the assured, nor any evidence tending to show that the contract went to the extent that the premiums should not be payable without prejudice to the policy until after notice to the plaintiff that such premiums were payable.

Which request the court refuses to give; but, in response to such request, stated to the jury as follows:

"I will read you all the evidence there is upon that subject; but as I understand that request, I shall probably not at present, unless I find something upon reading the testimony, give you as a conclusion of law the result of it, because I consider it is rather for you to determine what this proves as a fact. I have already told you, and if you do not understand it clearly I will make it clear, what it is necessary for the party to prove. I have given you instructions which cover the whole ground of what, as a matter of law, it is necessary that the party should prove in order to make out this estoppel. What, as a matter of fact, he does
prove is for you to determine upon the evidence in the case;
133 and I will read that again to you that you may not misunderstand.

"The only evidence in the case upon that subject is this:

"'He said it would not make any difference whether he went to California or not. He also said, in case I took it out, I should be notified when the premiums became due. He said it would make no difference whether he went to California or not, and that the company would notify me in season to pay the premiums. I need have no uneasiness about the matter at all. I should be notified in time from the company in Boston.

"'Question. Was this before or after taking out the policy?

"'Answer. It was before.'

"The counsel repeated that evidence to the witness, and the witness then says, 'Yes, sir. He said I should have due notice when the premiums became due, and in time to send on to the company in Boston; that the company in Boston would notify me. Those were the words he said.' That is all the testimony that comes from M'r Mowry. M'r Henry S. Knight said he was present, and the language he used is this: I took his words exactly, making quotation marks. 'M'r Shepley told the plaintiff he need not give himself any uneasiness, as the company would notify him.'

"The further testimony upon this point was as follows:

"A. M'r Mowry asked M'r Shepley how it would be about notifying when the premiums were due. M'r Shepley told him he need not give himself any uneasiness on that account, because the company would notify him.

"Q. When the premiums became due?

"A. Yes, sir.

134 "A. I went to M'r Shepley about it, & asked him why it was I was not notified by the company according to agreement, & he said he didn't understand it, or didn't know; he would go down to Boston with me, or take me down to see the president; so he took me down there, and introduced me to the president. I notified him that my uncle

was dead, & asked him why it was that I was not notified in time to pay it. He said it was customary to notify the parties whose lives were insured, I understood him to say. I told him I was the party insured virtually, because I paid the premiums, & they held my note for one-half the premium, and the policy was made payable to me in case of loss; and it was expressly understood between me and Shepley that the company would notify me.

"Q. What reply did he make, if any?

"A. I don't recollect exactly what he said about it. I believe he said I might recover by the laws of R. I., or something of that kind.

"And Crocker, page 16:

"Q. I will ask you in regard to the interview between M'r Mowry and yourself, in your office in Boston?

"A. I have no recollection of having any such interview; I might have had, but I don't recollect the man in any way, nor any such interview with him.

"That other officers of the company testified to a usage to notify always, and to notify insurer of the life, upon request."

135 Fourth. And also the defendant corporation excepts to so much of the charge of the court as instructs the jury that the jury were to determine what was intended should be understood, and what was in fact understood by the plaintiff by the language used by said Shepley, such portion of the charge excepted to being in the words following:

After that language was used, and after that conversation took place, the written contract was entered into between the parties, and that written contract provides that it should be void if the annual payments were not made on the day and at the time agreed upon, and that was subsequent to this conversation; and, therefore, so far as reliance is placed upon this as a change in consequence of what was said in words, by parol, that is the legal expression; that is, what is verbally said, so far as that is relied upon as an agreement in words before the making of the written instrument to change the terms and conditions of the written instrument, and so far as the claim is based upon that, I instruct you that the words of the written instrument, the contract, are not in any way modified or controlled by any verbal agreement as to those conditions which was made before.

But there is another ground, and that is the ground upon which, if any, the plaintiff would be saved from the forfeiture, or the ground upon which he claims he is saved from the forfeiture, and that is *that is* what is called an estoppel en pais, and that means simply some act which a party has done by a proceeding, not by deed, not by written instrument,
136 not in court, but some act which the party has done which disables him from setting up a defense he otherwise would have. That is what an estoppel is. It prevents a party from proving something which exists, and which if it were not for this estoppel he would be able to prove. I will give you an instance of an estoppel, by which you will understand very readily and easily what the effect of that is.

You convey to-day, to one of your fellows, a piece of land to which you have no title. You don't own it. You convey it to him by warranty deed, and he has your deed. Five years hence you buy that lot of land of somebody else, and you acquire a title to it, and then you claim as against this party to whom you have conveyed it. If it were not for the estoppel, it would be very easy for you to prove when you conveyed it to him you had no title, and therefore he took no title; and if you were at liberty to prove that fact, if that fact existed, it would show that he took no title to the land because you had no title to give him, yet, as

between you and him, the courts say you shall not be admitted to prove that fact, that you had no title, and that you had now acquired a title subsequently, by reason of that estoppel, which prevents you from showing you had no title, and he holds the land. That is, this estoppel operates to prevent you from proving the fact which did exist, because it would be inequitable and wrong for you to prove it and take advantage of it. That is what the estoppel is. That is what it is substan-
137 tially, if there be any estoppel in this case, and that is, not that
this written contract is modified by the words which were spoken and form no part of the contract.

And there may be such a case, and it is for you to consider whether this be or be not the case. There may be such a case as will prevent a party from introducing in evidence, and relying upon the evidence of something in his contract, that, apart from that estoppel, would constitute a good defense and would avail. It does not change the contract itself, but it prevents a man from relying upon that contract to make out his case. Now, that is the claim which is set up here. The claim is that this company, through its agent, made such representations to Mowry, the plaintiff, that he, relying upon those representations, failed to do the act which prevented this policy from lapsing and becoming forfeited because he relied upon certain representations, and they claim if such representations were made, and that he relied upon them, and in reliance upon them failed to make the payment provided for by the terms of the policy, then that the company is estopped from setting up that forfeiture which is provided for by the policy, by reason of his having relied upon their representations, and thereby failed to make the payment.

Now, that is the principal question for you to consider in this case, and you must look at the testimony carefully and see what the representations were, and whether they were, or not, of such a nature as would estop the corporation, the insurance company, from relying upon the conditions in the policy which are binding upon the parties.
138 What is the representation which they say this company through
its agent made? The words I have read to you. "He said it would not make any difference whether he went to California or not. I should be notified when the premiums became due." He does not say in terms that the company agreed if he was not notified he should be exonerated from paying, but he says, "that I should be notified when the premiums became due." Now, it is for you to determine as a question of fact what the company meant that this insured should understand, and what he did understand; what the one party meant that the other should understand, and what the other party did understand from that language that was used. Did the agent mean to say, "Although you agree to pay this annual premium, still you shall not be held to pay this premium until you get your notice?" Did he mean to make that, and did he give the other party to understand that that was an element of the contract which entered into it, and that he had a right to rely upon this notice, and was not bound to make his payment until he got this notice; or did he simply mean to state and give the other party to understand that he was stating what was the usage of the company, what they would do, or what was their habit, independent of its being an element of the contract?

If, for instance, you were to give a note that was payable ninety days from date, and the bank-officers should tell you that you would receive a notice before that note became due, would you from that under-
139 stand that you were at liberty to delay the payment of the note
until you received the notice?

But there is another element to be taken into consideration here, in which this differs from the case which I have put you, in regard to the payment of the note at the bank; and that is, the element of forfeiture, which distinguishes this case in one respect from that which I have to you by way of illustration, and that is, if connected with the giving of that note at the bank you had made a mortgage of personal property wherein the title would become absolute from the non-payment of the note at the time, and then the bank should say to you that they would give you notice when that became due, and you, relying upon that, did not make the payment when the payment became due, and they set up the forfeiture, or that the title became absolute, although it did not release you from the payment of that note on the day it became due, yet if they set up that the title to the property mortgaged became absolute by way of forfeiture upon that day, it would render it incumbent upon you only to show that they made such representations to you as authorized you to rely upon the fact that they would not insist upon that forfeiture unless they complied with that condition, and you are to consider this in reference to this state of facts as applicable here as well as the other; that is, if the corporation has set up a forfeiture under this condition, and not the mere fact that the man was released from the payment; the question is not whether he was released from the payment of his installment, but whether the non-payment of that annual installment on the day worked a forfeiture; and it requires 140 a little more proof to make out a forfeiture than it does to establish some other matters.

Now look at this language carefully which was used by these parties, and see precisely what they fairly understood on both sides by this statement which was made. If this statement was a mere statement, if it was so understood, if it was a mere statement, that the corporation usually gave a notice, if he only stated this as a matter of information to him—"The corporation gives the notice," "The corporation will notify you; that will not make any difference, the corporation will notify you"—if he merely stated that as a matter of information as to the course of dealing or habit of the company, why, then it was no element of the contract. But if you can find here from the testimony in the case that there was in the language which he used, or that there could be reasonably deduced from the language which he used, a contract between those parties that he should have that notice before he should be required to pay that installment, and before that forfeiture for the non-payment of the annual premium should be insisted upon, if the agent made such a contract as that in behalf of the company, and the plaintiff considered him to have made it, and assented to it, and there was a perfect agreement between these parties that the one party was to have the notice and should not be required to pay until he got the notice, if that was the agreement entered into between the parties, and there is any evidence in the case from which you can find there was such 141 an agreement entered into between the *the* parties, then I instruct you, if Shepley was the agent of the company, upon the principle I have stated to you, if you should find him to be the agent of the company, that such an agreement would estop the corporation from setting up the forfeiture because the payment was not made at the time.

But such a contract is not to be inferred; such a contract is to be proved, if relied upon. An estoppel is a thing which must be clearly proved against a party, because it deprives him of setting up a right which he has under his contract, and he is not to be deprived of that upon inference or guess, but upon positive proof; and if you should find any proof of that kind in this case, that such a contract as that in behalf of this corporation was entered into between these parties, not only that he should have such notice, but that he should not be called upon to pay until he has that notice, and that the forfeiture should not attach until he had it—if that was what the parties agreed upon at the time, while that would not modify the contract itself, it would have the effect to prevent the corporation from setting up that forfeiture and availing itself of that which is an element in the contract. But that must be established by proof, and the burden is on the party setting up to clearly make it out and establish it to your satisfaction.

Fifth. And also the defendant corporation excepts to so much of the charge of the court to the jury as instructs the jury that, notwithstanding the terms of the policy of insurance could not be altered or 142 modified as a contract between the parties by reason of any of the parol representations of the agent, Shepley, (set forth in the evidence quoted by the court in response to the third request for instructions, above recited,) made before the policy was issued and delivered, yet that such representations might be sufficient to work an estoppel upon the defendant corporation, and prevent the defendant from denying that such parol representations were a part of the contract.

Such portion of the charge excepted to is in the words following:

Now it is for you to determine, as a question of fact, what the company meant that this insured should understand; what the one party meant that the other should understand, and what the other party did understand from that language that was used. Did the agent mean to say, "Although you agree to pay this annual premium, still you shall not be held to pay this premium until you get your notice?" Did he mean to make that, and did he give the other party to understand that that was an element of the contract which entered into it, and that he had a right to rely upon this notice, and was not bound to make his payment until he got his notice: or did he simply mean to state and give the other party to understand that he was stating what was the usage of the company, what they would do, or what was their part, independent of its being an element of the contract?

If, for instance, you were to give a note that was payable ninety days from date, and the bank-officers should tell you that you would 143 receive a notice before that note became due, would you from that understand that you were at liberty to delay the payment of the note until you received the notice?

But there is another element to be taken into consideration here, in which this differs from the case which I have put you in regard to the payment of the note at the bank, and that is, the element of forfeiture, which distinguishes this case in one respect from that which I have given to you by way of illustration: and that is, if, connected with the giving of that note at the bank, you had made a mortgage of personal property, wherein the title would become absolute from the non-payment of the note at the time, and then the bank should say to you that they would give you notice when that became due, and you, relying upon that, did not make the payment when the payment became due, and they set up the forfeiture; or that the title became absolute, although it did not release you from the payment of that note on the day it became due, yet if they set up that the title to the property mortgaged became absolute by way of forfeiture upon that day, it would render it incumbent upon you only to show that they made such representations to you as authorized you to rely upon the fact that they would not insist upon

that forfeiture unless they complied with that condition; and you are to
consider this, in reference to this state of facts, as applicable here as
well as the other; that is, if the corporation has set up a forfeiture under
this condition, and not the mere fact that the man was released
144 from the payment, the question is not whether he was released
from the payment of his installment, but whether the non-pay-
ment of that annual installment on the day worked a forfeiture, and it
requires a little more proof to make out a forfeiture than it does to
establish some other matters.

Now look at this language carefully, which was used by these parties, and see precisely what they fairly understood on both sides by this statement which was made. If this statement was a mere statement, if it was so understood, if it was a mere statement that the corporation usually gave a notice, if he only stated this as a matter of information to him—"The corporation gives the notice," "The corporation will notify you; that will not make any difference, the corporation will notify you"—if he merely stated that as a matter of information as to the course of dealing or habit of the company, why then it was no element of the contract.

But if you can find here from the testimony in the case that there was
in the language which he used, or that there could be reasonably de-
duced from the language which he used, a contract between those
parties that he should have that notice before he should be required to
pay that installment, and before that forfeiture for the non-payment of
the annual premium should be insisted upon; if the agent made such a
contract as that in behalf of the company, and the plaintiff considered
him to have made it, and assented to it, and there was a perfect agree-
ment between the parties that the one party was to have the notice
and should not be required to pay until he got the notice; if that
145 was the agreement entered into between the parties, and there is
any evidence in the case from which you can find there was such
an agreement entered into between the parties, then I instruct you, if
Shepley was the agent of the company upon the principle I have stated
to you, if you should find him to be the agent of the company, that such
an agreement would estop the corporation from setting up the forfeiture
because the payment was not made at the time.

But such a contract is not to be inferred; such a contract is to be proved, if relied upon. An estoppel is a thing which must be clearly proved against a party, because it deprives him of setting up a right which he has under the contract, and he is not to be deprived of that upon inference or guess, but upon positive proof; and if you should find any proof of that kind in this case, that such a contract as that in behalf of this corporation was entered into between these parties, not only that he should have such notice, but that he should not be called upon to pay until he had that notice and that the forfeiture should not attach until he had it—if that was what the parties agreed upon at the time, while that would not modify the contract itself, it would have the effect to prevent the corporation from setting up that forfeiture and availing itself of that which is an element in the contract. But that must be established by proof, and the burden is on the party setting it up to clearly make it out and establish it to your satisfaction.

Because the defendant corporation requested the court to instruct the
jury—
146 Sixth. That the defendant corporation cannot be estopped to
deny that the representations made by the agent Shepley formed

a part of the contract between the parties, unless the knowledge that such representations were made is proved to have been brought home to the knowledge of the company before issuing and delivering the policy.

Which instruction the court refused to give, but did instruct the jury in response thereto as follows: "It depends entirely upon the extent of his agency. If he is a general agent—agent with general powers as to the particular transaction—then his acts are the acts of the principal, and the same things that would estop the principal, if said by himself, would estop him if said by the agent, within the scope of that agency."

Seventh. The defendant corporation also excepts to so much of the charge of the court as instructs the jury in substance that Shepley, having represented himself to the plaintiff as the agent of the defendant company, and the defendant company having afterwards issued and delivered a policy in which the following recitals occur: "The first payment of the before mentioned annual premiums having first been received by the company or their accredited agent during the life time & good health of the said insured," and also, "In witness whereof the said Union Mutual Life Insurance Company have, by their president and secretary, signed this contract, at their office in Boston, this ninth day of March, one thousand eight hundred and sixty-seven, but the same
147 shall not be binding until countersigned and delivered by John
Shepley, agent at Providence, R. I., nor until the advance premium is paid," the burden of proof was shifted to the defendant corporation to show that there were any limitations upon the agency of Shepley.

The portion of the charge excepted to is in the words following:

In the first place, as I have before stated to you, it is incumbent upon the plaintiff to prove this agency. That he was an agent of the company to some extent is admitted by the recitals in the policy; that he was an agent of the company to receive this application for this insurance is admitted by the recitals in the policy itself which is issued by the corporation. It is claimed on the part of the corporation that his agency extended no farther than that.

There the burden shifts. The burden having been upon the plaintiff in the first place to prove the agency, and then the corporation having recited that he was their agent after he had so represented himself, if you find the proof to be, as it is in my recollection, that his representation was simply of a general nature, (the witness said, "He came to me and represented himself to be the agent of the company,") if he did so represent himself to be the agent of the company, and if the ratification and acknowledgement of that agency was as general as the representations which he made of his agency, that is, simply that he was the agent of the company; if that agency was any more limited than that, then the burden is on the company to show not only the limitation, but
148 that knowledge of that limitation of the agency was brought home
to the party with whom the man was making the contract, which was assured by the corporation. And if you find that there is any evidence in this case of any limitation of his agency, which made it less than that which he represented, which was simply that he was the agent of the company, and that that knowledge was brought home to the party with whom he was acting before the policy was issued, why, then, his agency is to be limited to that extent to which a knowledge of the limitation was brought home to the party with whom he was acting. Otherwise, for all purposes within the scope of that business which he undertook to do, which was entering into the contract of insurance, to the extent of that business which he undertook to do, and that contract

which he undertook to make, his agency would be general, as he represented it.

The burden in this case is upon the plaintiff to show you that Shepley was the agent of this company, and he undertakes to prove that by showing that he represented himself as the agent; that he contracted with this party, entered into a contract with this plaintiff, under such representations, which contract was approved and ratified and entered into by the principal for whom he presumed to act, acknowledging him as agent. There is no evidence that I am aware of in the case tending to show in any way any limitation of that agency. The company defendant does not come here and undertake to show that there was any
letter of agency, any agency under the seal of the corporation,
149 and a specific & limited agency conferred upon this party. It
does not undertake to prove that Shepley was an agent with
limited powers—only to receive applications and to issue policies and to deliver policies issued by the company, but not to effect insurance. The company has introduced no evidence that I am aware of, that I recollect, as to the extent or the powers of that agency, any further than simply this ratification of his acts, in which they recited in general terms that he was the agent of the company.

If, therefore, you should find in this case that this man, whether he was or not originally the agent of this company, assumed to be the agent, and they ratified such assumption of power and received the benefit of it, and entered into the contract which this man undertook to make in their behalf, and if you should therefore come to the conclusion that, for the purpose of making that application, and doing those acts, and entering into that contract, he was the agent of the corporation that has ratified his acts and described him as their agent.

To which refusal to give the instructions requested, as well as to the instructions which were given as above set forth, the defendant corporation, by their counsel, excepted before the jury retired from the bar, and, as the matter thereof did not appear of record, prayed the court to allow and seal this bill of exceptions, which, being found correct, has been allowed and sealed accordingly.

June 16th, 1875.

150 [L. S.] G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

151, 152 *Writ of error.*

DISTRICT OF RHODE ISLAND, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the first circuit and district of Rhode Island, greeting:

[SEAL.]

Because that in the record & process, and also in the rendering of judgment in a suit before you, or some of you, between Daniel A. Mowry, jr, plaintiff, and the Union Mutual Life-Insurance Company, defendant, in a plea of the case, a manifest error has intervened, to the great damage of the said defendant, as has in his complaint been stated, and it is just and proper that the error, if any there be, should be corrected in due manner, and that full & speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the

Supreme Court of the United States on the second Monday of October next, at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Hon. Morrison R. Waite, our Chief-Justice, at Providence, in said district, this 16th day of June, A. D. 1875.

HENRY PITMAN, *Clerk.*

(Indorsed:) Writ of error. Daniel A. Mowry vs. The Union Mut. Life-Ins. Co. Filed June 16th, 1875.

153 District of Rhode Island, *ss:*

[SEAL.] The President of the United States of America to the marshal of said district, or to his deputy, greeting:

You are requested to make known to Daniel A. Mowry, j'r, of the city of Providence, in the State of Rhode Island, that in a certain cause in the circuit court of the United States, within and for said district of Rhode Island, wherein he was plaintiff, and the Union Mutual Life-Insurance Company were defendants, wherein judgment was rendered against the said defendant on the 16th day of June, 1875, as of the 21st day of November, 1874, the said defendant has this day sent out a writ of error unto the Supreme Court of the United States, next to be holden at Washington, in the District of Columbia, on the second Monday of October next.

And the said Daniel A. Mowry, j'r, is therefore cited and admonished to appear at said Supreme Court to show cause, if any there be, why the judgment rendered against the said Union Mutual Life-Insurance Company in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the seal of said circuit court and my hand this 16th day of June, A. D. 1875.

JOHN P. KNOWLES.
Judge of the Dis't C't of the United States for the Dis't of Rhode Island.

154 Rhode Island District, *ss:*

Providence, *June 29th*, 1875.

I have this day made service of this citation on the within-named Daniel A. Mowry by leaving a true and attested copy hereof at the last and usual place of abode of said Mowry.

JAMES H. COGGESHALL,
U. S. Marshal.

Service, 2.00; copy & tr., 74—2.74.

(Indorsed:) Citation. Daniel A. Mowry vs. Union Mut. Life-Ins. Co. Issued June 16, 1875.

155 United States of America,
District of Rhode Island, ss:

Clerk's Office, Circuit Court,
Providence, September 20th, 1875.

I, Henry Pitman, clerk of the circuit court of the United States for the first circuit and district of Rhode Island, in pursuance of the command contained in the within writ of error, do make return thereof and annex hereto and transmit herewith a true copy of the entire record, and all proceedings in the cause or suit, Daniel A. Mowry, jr, plaintiff, against the Union Mutual Life Insurance Company, defendant, wherein judgment was rendered in said circuit court of the United States.

I also annex the citation served by the United States marshal of said district upon the issuing of said writ of error, a copy of which writ was lodged in this office on the sixteenth day of June, A. D. 1875, by the plaintiff in error, for the adverse party."

In testimony whereof I have hereunto set the seal of said court, and my hand, this twentieth day of September, A. D. 1875.

[SEAL.] HENRY PITMAN, *Clerk.*

Indorsement on cover: No. 155. The Union Mutual Life Insurance Company, plaintiff in error, vs. Daniel A. Mowry. Rhode Island C. C. U. S. Filed 25th September, 1875.

◆

Supreme Court of the United States.

October Term, 1877.

No. 135.

THE UNION MUTUAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

DANIEL A. MOWRY, JR.

BRIEF FOR PLAINTIFF IN ERROR.

BENJ. F. THURSTON,
CHAS. H. PARKHURST,
Counsel for Plaintiff in Error.

J. A. & R. A. REID, PRINTERS, PROVIDENCE.

UNION MUTUAL LIFE INSURANCE CO.,
Plaintiff in Error,

vs.

DANIEL A. MOWRY, JR.,
Defendant in Error.

No. 135.

In error to the Circuit Court of the United States for the District of Rhode Island.

◆

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action upon a policy of life insurance dated March 9, 1867, and issued by the Union Mutual Life Insurance Company, upon the life of Nelson H. Mowry and payable to Daniel A. Mowry, Jr., the defendant in error.

The first premium was paid when the policy was delivered. The second premium due March 9, 1868, was not paid. Nelson H. Mowry, whose life was assured died April 8, 1868, thirty days after the date when the premium became due. Payment of this premium was tendered to the company April 23, 1868, forty-five days after the same became due, and fifteen days after the death of Nelson H. Mowry, and was refused by the company.

The company declined to pay the amount insured by the policy and suit was brought to recover the same and a judgment was rendered for the plaintiff in the court and the cause comes to this court by writ of error.

The plaintiff in error has assigned seven grounds of error.

I.

The first exception presented by the record is:

That the court refused to instruct the jury as requested by the plaintiff in error,

> "That though the jury may believe that John Shepley did make an agreement that notice of the maturing of future premiums should be sent to the plaintiff, the plaintiff is not thereby relieved from paying the premiums at the times stipulated by the policy in case notice is not sent to him."

The court refused this instruction, because it was conditional upon what he (Shepley) was.

It is submitted that the reason given by the court for the refusal to give the instruction asked in view of what appears in the record as to the position of Shepley in the cause and his relation to the policy which was the basis of the suit, was not a sufficient reason for refusing to give the instruction prayed for.

The court had in its charge instructed the jury that Shepley was recognized by the company as its agent, and the request was based upon what the court had charged and upon the facts then before the jury.

The result of the doctrine as thus stated by the court would be that any verbal representation made by an agent, however limited his powers, though not incorporated in the written contract subsequently made by the parties (if not complied with by the principal) would enable the other party to the contract to abrogate the conditions of the written contract.

In Lee vs. Howard Insurance Company, 3 Gray, 583, the court hold that the policy is the written contract which fixes and determines the rights of the parties, and these cannot be varied in the absence of fraud by the verbal acts or conduct of the parties or their agents previous to its execution or delivery.

In Mecke vs. Philadelphia Insurance Co., 8 Phil., 6, the court hold that a person who receives a policy of insurance varying from the verbal agreement made with the agent and retains it, paying premiums, cannot set up the verbal contract to defeat the requirements of the policy as he is presumed by receiving the policy to have waived any verbal agreements made prior to its execution and not contained in the policy.

II.

The second exception is as follows:

That the court refused to instruct the jury,

> "That the defendant company, by the recognition of Shepley as their agent, by the fact that they received the application for insurance bearing his certificate as agent and by issuing the policy requiring the same to be countersigned and delivered by Shepley as agent, is not to be presumed as having recognized or affirmed any contract or representation made by Shepley in reference to the subject of giving notice as to maturing premiums not brought home to the knowledge of the company."

This request reciting in substance what appeared in the application and policy called for a construction of those parts of the written contract, and it is submitted that the words used in the concluding clause of the policy, *namely:* "But the same, (the policy) shall not be binding until countersigned and delivered by John Shepley, agent, at Providence, R. I., nor until the advance premium is paid," were a distinct and specific limitation of the power of the agent, Shepley, brought home to the knowledge of the plaintiff, Mowry, and that power was limited to what was necessary to be done in order to make the policy a binding contract, *i. e.*, to countersigning and delivering the policy and receiving the advance premium, and that when Mowry received the policy with no provision in it binding the company to give notice of the time of the maturing of future premiums, he must be presumed to have waived any claim that such notice was any part of the contract for insurance.

The practical construction given by the court to this clause in the policy, was that Shepley was by these words constituted the general agent of the company without any limitation upon his power, and that any contract or representation made by him prior to the execution of the written contract was binding upon the company. The corporation claim that they were entitled to the instruction asked as the plain legal construction of the written contract.

Bouton vs. American Mutual Life Ins. Co., 25 Conn., 542.
Insurance Co., vs. McMillen, 24 Ohio St., 67.
Catoir vs. Ins. Co., 33 N. J., 487.
2 American Leading Cases, 913 *et seq.*

In the case of Bouton vs. American Mutual Life Insurance Co., the question at issue was, whether the agent, whose powers were described in the attestation clause of the policy, had power to waive the condition of advance payment of the premium as stipulated in the policy, and the court say:

> "The question is whether it was proved on the trial that Webb was authorized by the defendants as their agent, thus to waive the non-payment in advance of the premium as required by the terms of the policy. The first premium due on it was paid in advance to Webb, up to January 1, 1852, according to its terms, and it was at the time of such payment countersigned and delivered to the insured.
>
> "The question before us respects the next premium payable in advance on that day, in regard to which it was, as claimed by the plaintiff, paid by the assured to Webb, and received by him for the purpose of reviving and continuing the policy, but confessedly after that day and without any

other authority in Webb excepting that which is contained in the policy itself.

“ We are therefore to look to that instrument alone for the evidence of his authority to receive that premium. And the only expression in it from which that authority is claimed to appear, is the testimonium clause at the end which provides that the policy ‘shall not be binding until countersigned by W. W. Webb, agent, and delivered and the advance premium paid.’

“ The question before us therefore, depends upon the construction of that clause, or rather of the word ‘agent’ contained in it, taken however with any other part of the instrument which may shed any light upon its meaning.

“ In this case there is nothing in any other part of it which aids us in ascertaining the extent of the authority conferred upon Webb as the agent of the defendant, so that in determining its extent we are left entirely to the clause which has been mentioned. The policy whether it is to be construed as conferring or only recognizing an authority to be exercised by Webb, evinces that he has a power to act for the defendants, at least for some purposes, because that is necessarily implied in the term by which he is expressly designated as agent.

“ If to suppose a case so singular it had stopped there, and nothing in the instrument had been connected with that term or referred to by it to show to what it related it would have been wholly indefinite and uncertain, not only as to the subject, but also as to the extent of his authority. It would have indicated merely the existence of that relation between the defendants and Webb which constitutes what is termed agency, but which would be consistent with the existence of any one kind or any particular extent of power conferred by that relation as well as another. It would have been satisfied by considering him an agent for any purposes and with any power whatever, and it is difficult to see on what ground any particular effect, or at most, more than the most limited one could properly be given to it. We cannot accede to the claim of the plaintiff that the broadest signification ought to be put upon it because the term agent is used without any express qualification. To give it such an unlimited effect would extend its meaning beyond what it could reasonably be supposed was intended by the parties, and we are aware of no rule which requires such a construction. The rule of construing language in pleadings and contracts most strongly against the party using it which, however, prevails only in cases of necessity, and where all other means of construction fail, does not apply to an instrument by which an authority is delegated to an ordinary agent. It is not a contract nor has it properly speaking any parties, and it is at least questionable whether even in pleadings where the term in question should be used, it would be construed to imply an authority as broad as the plaintiff here claims for it.

“ There is not here any doubt or obscurity as to the meaning of the term used, but the difficulty arises from the circumstance that it of itself expresses merely a particular relation between the defendants and

Webb generally, and which requires something more expressed or to be inferred from extrinsic proof, in order to show the specific character and extent of that relation, and to what acts in particular it was intended to apply.

"There is nothing in the character of this policy, or in the language of the clause containing the 'term in question, which in our opinion requires that it should be interpreted by any artificial or technical rule of construction, or otherwise than according to its natural effect.

"But this idea need not be pursued, for in this case the word we are considering is not left unconnected with anything in the instrument from which the nature or scope of the agent's authority can be ascertained.

"The concluding expression in it on which the question before us arises, is that the 'contract' expressed in the policy 'shall not be binding until countersigned by W. W. Webb, agent, and delivered, 'and the advanced premiums paid.'

"From this it is clear that the policy was not to take effect by delivery to the insured by the defendants immediately on its execution by the latter or by any other delivery than one which should be made through an agent, that it was intended that the delivery of it by such agent was not to make the contract binding until it should be countersigned by him and the premium mentioned in it should be paid in advance, that is before the commencement of the period for which the insurance under it should be effected, and that Webb was the particular and only person or agent to whom the premium should be paid and by whom the policy should be countersigned and delivered on behalf of the defendants.

"That mode is particularly described, and required the interposition of an agent and Webb was designated as that agent. The clause states exactly what is to be done by him, or in other words, the authority which the defendants have conferred on him. The word agent added to his name considered as we are now doing with reference only to the said clause imports no more than that he was the agent of the defendants to do and coöperate in the things which it was therein provided should be done for the purpose therein mentioned of making the contract binding. One of those things was the payment by the insured of the premium in advance *to* and consequently its reception *by* him. This being done together with the countersigning and delivery of the policy, the contract became, but could not otherwise become consummated and complete.

"The question now is as to the extent of the authority which was thus conferred on Webb in regard to the premiums provided for in the contract. We think he was not empowered to receive any premium which was not paid according to the requirements of the policy that is in advance. That instrument was his sole guide in regard to what he should do under it. The contract was to be made by the defendants and not by him except in the capacity of their agent, he was not authorized to alter or vary it or to depart in any respect from it, or dispense with the fulfillment of its conditions by the insured, or discharge it, or receive it after it had by its terms ceased to be obligatory on his principals by a waiver of compliance with its provisions or otherwise. These must be done by the parties to the contract. He was only authorized to act in pursuance of it and then only so far as it gave him authority. He could exercise only the power delegated to him, and no power is delegated to him to depart from the terms of the policy.

" It surely is not necessary to cite books to show that an agent authorized only to execute a contract in behalf of one of its parties, has no power to vary it or dispense with its execution by the other or that one authorized by a person to receive a payment of a sum of money from another on and pursuant to a conditional contract which requires such payment to be made at a specified time is thereby empowered to authorize or waive a breach of such condition.

" If it be admitted that by the clause in question Webb was authorized to receive not only the first premium which was required to be paid on the policy, but also those which it provided might subsequently be paid upon it which has not been denied by the defendants, the question before us may be tested by inquiring whether in respect to the first premium the policy gave Webb any authority to bind the defendants by a delivery of the policy before the payment of such premium, for as he had no greater power in regard to subsequent premiums than he had as to the first, it is quite clear that if he was not authorized to postpone the payment of the first, he was not as to those accruing afterwards.

" To this inquiry the policy furnishes a most explicit and decisive negative answer. It expressly says that the policy shall not be binding ' until the advance premium is paid.' The whole authority of the agent being here expressed on the face of the instrument there is no place for the doctrine which is applicable to cases where an agent with an ostensible general authority is restricted by particular and special private instructions from his principal and which has been adverted to by the plaintiff's counsel.

" We are therefore of the opinion, although Webb might be, and we are strongly inclined to think he was authorized by virtue of his agency, as indicated in the policy to receive in advance the payment of premiums which should by its terms be payable subsequent to its execution and delivery he was not thereby authorized to receive such premiums after the day on which it was provided by the policy that they should be so paid in advance and therefore that on this point a new trial should be granted.

" Our opinion is confined to the question as to the character and extent of Webb's authority as deducible from the terms of the policy itself, leaving the plaintiff at liberty to prove expressly by extrinsic evidence an authority to receive premiums after the time when they were made payable by the terms of the contract, so as to receive it or facts from which such authority should be implied."

The third exception is that the court refused to instruct the jury.

"That there is no evidence in the case tending to show that the representations of Shepley at any interview with the plaintiff before the issuing and delivery of the policy of insurance went to the extent that the company should give notice to the plaintiff of maturing premfums as a part of the contract between the insured and the assured, nor any evidence tending to show that the contract went to the extent that the premiums should not be payable without prejudice to the policy until after notice to the plaintiff that such premiums were payable."

The testimony was recited by the court as appears in pages 51 and 52 of the printed record as follows:

"The only evidence in the case upon that subject is this:

"He said it would not make any difference whether he went to California or not.

"He also said in case I took it out I should be notified when the premiums became due. He said it would make no difference whether he went to California or not and that the company would notify me in season to pay the premiums. I need have no uneasiness about the matter at all. I should be notified in time from the company in Boston.

"'Question. Was this before or after taking out the policy ?'

"'Answer. It was before.'

"The counsel repeated that evidence to the witness and the witness then says, 'Yes, sir. He said I should have due notice when the premiums became due and in time to send on to the company in Boston; that the company in Boston would notify me. Those were the words he said.' That is all the testimony that comes from Mr. Mowry. Mr. Henry S. Knight said he was present and the language he used is this. I took his words exactly, making quotation marks: 'Mr. Shepley told the plaintiff he need not give himself any uneasiness, as the company would notify him.'

"The further testimony upon this point was as follows:

"A Mr. Mowry asked Mr. Shepley how it would be about notifying when the premiums were due. Mr. Shepley told him he need not give himself any uneasiness on that account because the company would notify him.

"'Q. When the premiums became due ?'

"'A. Yes, sir.'

"'A. I went to Mr. Shepley about it and asked him why it was I was not notified by the company, according to agreement, and he said he didn't understand it or didn't know; he would go down to Boston with me or take me down to see the President, so he took me down there and introduced me to the President. I notified him that my uncle was dead, and asked him why it was that I was not notified in time to pay it. He said it was customary to notify the parties whose lives were insured, I understood him to say. I told him I was the party insured, virtually, because I paid the premiums, and they held my note for one-half the premium and the policy was made payable to me in case of loss, and it was

expressly understood between me and Shepley that the company would notify me.'

" 'Q. What reply did he make, if any ?'

" 'A. I don't recollect exactly what he said about it. I believe he said I might recover by the laws of Rhode Island, or something of that kind. And Crocker, page 16.'

" 'Q. I will ask you in regard to the interview between Mr. Mowry and yourself, in your office in Boston?'

" 'A. I have no recollection of having any such interview, I might have had but I don't recollect the man in any way nor any such interview with him.' "

The exception now brings before the court the legal effect of the testimony offered to prove the existence of an agreement, which the court had instructed the jury mustbe proved to have existed, "that he need not pay his premiums until such notice was given." (Page 47, printed record.)

This testimony did not tend to show the existence of any such contract or agreement as indicated in the request, and the court should have construed the language, which was uncontradicted, and should have given its legal effect, and the refusal so to do is error.

Klein vs. Russell, 19 Wallace, 433.
Insurance Co. vs. Baker, 94 U. S., 610.
Garrard vs. Reynolds, Lessee, 4 How., 123.
Hynds vs. Hays, 25 Ind., 32.
Fleming vs. Marine Ins. Co., 4 Wharton, 59.
Jones vs. Wood, 16 Pa. St., 25.
Bond, Admr., vs. Hall, 8 Jones, (Law.) N. C., 14.
Small vs. Smith, 1 Denio, 583.
Harris vs. Wilson, 1 Wend., 511.
Gale vs. Wills, 12 Barb., 85.
Morrison vs. N. Y. & N. H. Railroad Co., 32 Barb., 569.
Underhill vs. N. Y. & Harlem R. Co., 21 Barb., 489.
Story vs. Brennan, 15 N. Y., 524.
Deshler vs. Beers, 32 Ill., 368.
Clarks, Admr., vs. Hannibal & St. Joseph R. Co., 36 Mo., 202.
Smith vs. Hannibal & St. Joseph R. Co., 37 Mo., 287
Houghtaling vs. Ball, 19 Mo., 84.
Yates vs. Brackenbridge, 27 Mo., 531.

IV.

The fourth exception is to that portion of the charge of the court instructing the jury that they were to determine what was intended should be understood, and what was in fact understood by the plaintiff by the said language used by said Shepley (as recited by the court in response to the request for instructions as stated in the third exception.)

The language used was proved by the plaintiff and was not controverted by any testimony introduced by the defendants, and its legal effect was a matter to be determined by the court rather than the jury. The instructions which were given and which as given form the basis of this exception left the construction of the agreement set up by the plaintiff, the terms of which were not disputed, to be determined by the jury.

See cases cited under Point III.

V.

The fifth exception is to that portion of the charge which instructs the jury that notwithstanding the terms of the policy of insurance could not be altered or modified as a contract between the parties by reason of any of the parol representations of the agent Shepley, (set forth in the evidence quoted by the court in response to the third request for instructions above recited,) made before the policy was issued and delivered, yet that such representations might be sufficient to work an estoppel upon the defendant corporation and prevent the defendant from denying that such representations were a part of the contract.

In order to sustain the portion of the charge to which this exception refers, the proved representations must have been within the scope of the authority of the agent Shepley, or if not within the scope of his authority, must have been ratified by the company.

Was the agreement in relation t
premiums within the scope of Shep

Cases need hardly be cited to sh
try, as an almost universal rule, ag
companies have no power to make

Bliss on Life Insurance, Section 280.

And the whole tendency of the
effect that if there has been no e
matter of estoppel except by a local
additional proof of specific authorit
the company will not be bound.

In the case of Lohnes vs. Ins. Co.
Mass., 439, (a fire insurance
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In the case of Insurance Co. vs. Wi
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The only ratification of what was
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delivered by John Shepley, agent at Providence, R. I., nor until the advance premium is paid."

This is the only written evidence of his power as agent and his power is here limited to countersigning and delivering the policy and receiving the premium.

VI.

The sixth exception is based upon the refusal of the court to instruct the jury.

> "That the defendant corporation cannot be estopped to deny that the representations made by the agent Shepley formed a part of the contract between the parties unless the knowledge that such representations were made is proved to have been brought home to the knowledge of the company before issuing and delivering the policy."

In response to this request the court instructed the jury as follows:

> "It depends entirely upon the extent of his agency. If he is a general agent—agent with general powers as to the particular transaction—then his acts are the acts of the principal and the same things that would estop the principal if said by himself would estop him if said by the agent within the scope of that agency."

The record shows no agency on the part of Shepley except what is contained in the last clause of the policy, namely, "the same (the policy) shall not be binding until countersigned and delivered by John Shepley agent at Providence, Rhode Island, nor until the advance premium is paid."

As Shepley had no power to make any contract relative to insurance as shown by the record, except as stated in the policy, the company cannot be estopped from showing his want of authority in making the representations alleged, nor that they formed no part of the contract of insurance.

Ryan vs. World Life Ins. Co., 41 Conn., 168.
Morey vs. N. Y. Life Ins. Co., 2 Woods, C. C., 663.
Sullivan vs. Cotton States Ins. Co., 43 Ga., 423.
Adams Express Co. vs. Trego, 35 Md., 47.
Busby vs. N. A. Life Ins. Co., 40 Md., 572.
Catoir vs. Ins. Co., 33 N. J., 487.
Ins. Co. vs. Wilkinson, 13 Wallace, 222.

There could be no ratification unless the company had knowledge of the representations, or the representations were such that the company must be presumed to have known them.

Ins. Co. vs. McMillen, 24 Ohio St., 67.

In the case of Adams Express Co. vs. Trego, 35 Md., 47, the court say:

> "It is true the act of the agent, though unauthorized at the time, may become binding upon the principal by ratification and adoption. But to make such ratification effectual it must be shown that there was previous knowledge on the part of the principal of all the material facts and circumstances attending the act to be ratified. Bell vs. Cunningham, 3 Pet., 81. Owens vs. Hull, 9 Pet., 607. Pennsylvania, Delaware and Maryland Steam Nav. Co., vs. Dandridge, 8 Gill. & John, 249. Mayor and C. C. of Baltimore vs. Reynolds, 20 Md., 1. If the principal assents to the act while ignorant of the facts attending it, he may disaffirm it when informed of such facts. Copeland vs. Ins. Co., 6 Peck, 198. And it is equally true that where an act is done in behalf of the principal though not within the authority of the agent, if the former has full knowledge upon the subject and from which he derives benefit he must dissent and give notice of the fact within a reasonable time or his assent and ratification will be presumed. Brigham vs. Peters, 1 Gray, 139."

In the case of Ryan vs. World Life Ins. Co., 41 Conn., 168, it was alleged that the agent of the company inserted in the application for insurance erroneous answers to certain questions when in fact true answers were given by the applicant and the claim was made that as the incorrect answers in the application were there by the sole act of the agent, the defendant company was bound by those answers and was precluded from denying their truth.

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The court say :

> " Whether this is so or not depends upon the extent of the agent's authority. It must be admitted that the express authority of the agent was limited to receiving the application, forwarding it to the Home office and delivering the policy and collecting the premiums.
>
> " In most if not all of the cases in which the act of the agent has been regarded as the act of the principal, the act has been the natural and probable result of the relations existing between the parties or so connected with other acts expressly authorized as to afford a reasonable presumption that the principal intended to authorize it. Courts should never extend by implication the power of an agent except to carry into effect the probable intention of the parties, or to prevent third persons dealing with the agent from being misled to their agency.
>
> " The court also hold that a limited agency in a case of life insurances will not be extended by operation of law to an act done by the agent in fraud of his principal and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent
>
> " The power of the agent was limited, he had no power to issue policies. The terms of his agency conferred no authority to waive conditions or forfeitures or to agree to false or fraudulent answers to any of the interrogatories or to make any other contract to bind the company. Presumptively the insured and the plaintiff knew all this before paying the premium."
>
> Morey vs. New York Life Insurance Co., 2 Woods, C. C., 663.

In this case one Morey, the agent of the defendants made the statement to John B. Morey the assured at the time the application for the policy was made as an inducement to said John B. Morey to take the policy. "that the company was in the habit of giving thirty days previous notice of maturing premiums and that he would give the notice and save the forfeiture." No notice of the time when the premium became due was given. The assured died two days after the time when the premium was due, and two days after his death payment of the premium was tendered and refused.

The court say :

> " The policy and the conditions annexed to it constituted the contract and must be held binding on both parties to it, unless its conditions have been waived by some act or omission of the party against whom it is

sought to be enforced, or by the authorized agent of such party. The proof fails to show that the agent Morey, had any authority to engage that notice should be given, indeed none such is claimed, but it is claimed that being the agent it was a fraud in him to make such a promise, as it misled the assured, and induced him to take the policy which he would not otherwise have done. But it is apparent from the proof that he did not make the promise as agent or pretend to bind the defendant, but only made it as a friend and relative of John B. Morey. It was a mere personal promise for the fulfillment of which he could only look to him who made it. Morey, the agent for this purpose, was more the agent of the assured than the insurer, so that upon the facts this want of notice cannot avail the plaintiff."

Sullivan vs. Cotton States Life Ins. Co., 43 Ga., 423.

On the trial of the case it appeared that the semi-annual premium which became due on the 25th of April, 1870, had not been paid or offered to be paid by the insured to the company or its agents, but the plaintiff offered evidence to prove *that prior to the execution and delivery of the policy* one Laird, who was acting as the agent of the company to obtain policies of insurance, told the deceased it would make no difference if the premiums were not paid regularly to the day, so the money was paid in a short time after the day, if paid as soon as convenient afterwards.

On objection being made this evidence was rejected by the court and the plaintiff excepted. There was no error in the court in ruling out the evidence.

"It is a well settled principle of law that parol declarations cannot be received to vary or contradict the terms of a written contract. All that was said between the contracting parties in relation to the terms and stipulations of the contract is presumed to have been merged in the written contract, which is the highest and best evidence of the contract between the parties in the absence of any evidence as to fraud, accident or mistake at the time of its execution, delivery and acceptance by the contracting parties."

VII.

The seventh exception is to that portion of the charge which instructed the jury in substance that Shepley having represented himself to the plaintiff as the agent of the defendant company and the defendant company having afterwards issued and delivered a policy in which the following recitals occur: "The first payment of the before mentioned annual premiums having been first received by the company or their accredited agent during the lifetime and good health of the said insured," and also, "In witness whereof the said Union Mutual Life Insurance Company have by their president and secretary signed this contract at their office in Boston, this ninth day of March, one thousand eight hundred and sixty-seven, but the same shall not be binding until countersigned and delivered by John Shepley, agent at Providence, R. I., nor until the advance premium is paid," the burden of proof was shifted to the defendant corporation, to show that there were any limitations upon the agency of Shepley.

The portion of the charge excepted to is as follows:

> "In the first place as I have before stated to you it is incumbent upon the plaintiff to prove this agency. That he was an agent of the company to some extent is admitted by the recitals in the policy, that he was an agent of the company to receive this application for this insurance is admitted by the recitals in the policy itself which is issued by the corporation. It is claimed on the part of the corporation that his agency extended no further than that.
>
> "There the burden shifts. The burden having been upon the plaintiff in the first place to prove the agency, and then the corporation having recited that he was their agent after he had so represented himself, if you find the proof to be as it is in my recollection that his representation was simply of a general nature, (the witness said 'He came to me and represented himself to be the agent of the company,') if he did so represent himself to be the agent of the company and if the ratification and acknowledgment of that agency was as general as the representation which he made of his agency, that is simply that he was the agent of the company, if that agency was any more limited than that, then the burden is on the company to show not only the limitation, but that knowl-

edge of that limitation of the agency was brought home to the party with whom the man was making the contract which was assured by the corporation. And if you find that there is any evidence in this case of any limitation of his agency which made it less than that which he represented which was simply that he was the agent of the company and that that knowledge was brought home to the knowledge of the party with whom he was acting before the policy was issued, why then his agency is to be limited to that extent to which a knowledge of the limitation was brought home to the party with whom he was acting, otherwise for all purposes within the scope of that business which he undertook to do, which was entering into the contract of insurance, to the extent of that business which he undertook to do and that contract which he undertook to make, his agency would be general as he represented it.

"The burden in this case is upon the plaintiff to show you that Shepley was the agent of this company and he undertakes to prove that, by showing that he represented himself as the agent, that he contracted with this party, entered into a contract with this plaintiff under such representations which contract was approved and ratified and entered into by the principal for whom he presumed to act, acknowledging him as agent. There is no evidence that I am aware of in the case, tending to show any limitation of that agency. The company defendant does not come here and undertake to show that there was any letter of agency, any agency under the seal of the corporation, and a specific and limited agency conferred upon this party. It does not undertake to prove that Shepley was an agent with limited powers—only to receive applications and to issue policies, and to deliver policies issued by the company, but not to effect insurance. The company has introduced no evidence that I am aware of, that I recollect, as to the extent or the powers of that agency any further than simply this ratification of his acts, in which they recited in general terms that he was the agent of the company.

"If therefore you should find in this case that this man, whether he was or not originally the agent of this company, assumed to be the agent and they ratified such assumption of power and received the benefit of it and entered into the contract which this man undertook to make in their behalf, and if you should therefore come to the conclusion that for the purpose of making that application and doing those acts and entering that contract he was the agent of the corporation that has ratified his acts and described him as their agent.'

It is difficult to conceive how a charge could be framed better calculated to mislead the jury than the portion which is the ground of the seventh exception.

The very recitals in the policy which are referred to in the charge are a specific and exact limitation of the agent's powers.

The court say, "Shepley represented himself as the agent of the company." The record shows that the knowledge the defendant corporation had of his representations was that he, Shepley, said he was acquainted with Nelson H. Mowry, and Daniel A. Mowry the applicants, that he had read the answers to the questions contained in the application, and believed them to be true, and that he believed the life of Nelson H. Mowry, safely insurable and he signs his statement.

"JOHN SHEPLEY,

Agent at Providence."

(See page 36, printed record.)

The plaintiff himself proved the limitations to Shepley's authority when he put in his policy, and the company claimed no other limitation to his powers except what were found in the policy, and the court in construing the policy say there is no evidence of any limitation upon his powers, that his agency was general for the purpose of making the contract of insurance.

The plaintiff also proved the non-payment of the premium required to be paid to prevent the policy from lapsing, and set up as a reason for non-payment his verbal agreement with Shepley, so that the burden was still upon him to show an agreement which would release him from the payment and still keep his policy in force until he received notice of its coming due, and an agreement made with one authorized to contract for the company.

BENJ. F. THURSTON,
CHAS. H. PARKHURST,

For Plaintiff in Error.

Brightman v Hicks
108 Mass 246
Langdon v Doud
10 Allen 433
Bigelow Estoppel 2 Ed 488

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BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 135.

THE UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

VS.

DANIEL A. MOWRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF RHODE ISLAND.

DECEMBER, 1877.

Supreme Court of the United States.

No. 135. NOVEMBER, 1877.

THE UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

DANIEL A. MOWRY.

In Error to the Circuit Court of the United States for the District of Rhode Island.

BRIEF FOR MOWRY, DEFENDANT IN ERROR.

Daniel A. Mowry, Jr., brought an action against the Union Mutual Life Insurance Company, on a policy by which that corporation had assured him $10,000 on the life of his uncle, Nelson H. Mowry. The death took place April 8, 1868. The only defense was, that the annual premium, which by the terms of the policy the assured expressly promised to pay during the term, and which was due March 9, 1868, was not paid or tendered until on or about April 12, 1868, about a month after it was due. The company contended that this failure to pay on the day worked a forfeiture of the policy, by force of the forfeiture clause found at the top of page 33. The plaintiff contended that the delay was owing to the act of the defendant corporation, and that they were therefore estopped to take advantage of it to create a forfeiture.

The verdict and judgment were for the plaintiff, Mowry.

The error is alleged to consist in the charge to the jury, claimed to have been erroneous, in point of law.

The papers sent up improperly contain a *verbatim* report of all the evidence, and the whole charge. This is no part of the record. All that this court can consider are the declaration and policy and application referred to in it, (pp. 1, 32,) the plea, (p. 4,) the verdict and judgment, (p. 48,) and the bill of exceptions, (pp. 50–58.)

Balt. & Pot. R. R. *v.* Trustees, 91 U. S., (1 Otto,) 127.

The result, however, will be the same, whether the court consider all the evidence or only what is set forth in the bill of exceptions as the subject-matter to which the instructions given or asked for relate.

If the instructions given were sufficient and clear, touching the points to which the exceptions relate, there is no cause for reversal, although the instructions asked for and refused may be correct in the abstract.

Schools *v.* Risley, 10 Wall., 150, and cases cited.

The case suggested two questions, though we think that the exceptions only raise one of them. The first is, whether certain acts done and declarations made to the plaintiff at the time of taking out the policy, and preliminary to it justified the jury in finding that, if they were made by the company, the company would thereby be estopped from setting up the defense of forfeiture. The other question is, whether the person who made those statements was so far the agent of the company in the business that the statements made were the statements of the company itself. The first question depends upon the law of estoppel and the second upon the law of agency.

THE ESTOPPEL.

The insurance company was a Maine corporation; its principal office, with its president, &c., was in Boston, and it was represented in Providence by Mr. John Shepley. Shepley solicited the plaintiff to take out the policy in question, on the life of the uncle, and at the time and before the policy was issued, said to him as follows: "The company would notify me in season to pay the premiums; I need have no uneasiness about the matter at all; I should be notified in time from the company in Boston. * * * He said I should have due notice when the premiums became due, and in time to send on to the company in Boston; that the company in Boston would notify me." Another witness present at the interview testified: "Mr. Shepley told the plaintiff he need not give himself any uneasiness, as the company would notify him. * * * Mr. Mowry asked Mr. Shepley how it would be about notifying when the premiums were due. Mr. Shepley told him he need not give himself any uneasiness on that account, because the company would notify him." This is what then passed between them, as set forth in that part of the bill of exceptions, (p. 51,) which professes to state "all the evidence there is upon that subject."

The bill of exceptions, and the full report of the evidence, also, shows that there was no attempt whatever to controvert this statement of the interview. It was conceded that the company did not notify him, and it is not pretended that the payment was thought of by the plaintiff until it was accidentally brought to his attention, the day after his uncle's death, when the following took place (bill of exceptions, p. 51.): "I went to Mr. Shepley about it and asked him why it was I was not notified by the company, according to agreement, and he said he didn't understand it, or didn't know; he would go down to Boston with me, or take me down to see the president; so he took me down there and introduced me to the president; I notified him that my uncle was dead, and asked him why it was that I was not notified in time to pay it. * * * I told him * * it was expressly understood between me and Shepley, that the company would notify me. * * * I believe he said I might recover by the laws of Rhode Island, or something of that kind." (Which accounts for the fact that this suit, begun in the state court, was removed by the company to the United States court, under the act of March 2, 1867. Record, p. 5.)

This interview in Boston took place April 12, and subsequently, April 22, a check was sent to the company and actually received, though, upon the ground that it was receipted for by a clerk in ignorance of the facts, they afterwards attempted to return it.

The bill of exceptions shows that in the course of his charge the judge thereupon said to the jury: "I have given you instructions which cover the whole ground of what, as matter of law, it is necessary that the party should prove in order to make out this estoppel. What, as matter of fact, he does prove, is for you to determine, upon the evidence in the case." (P. 51.)

There is no exception which raises the question as to the correctness or sufficiency of the instructions given with regard to what is necessary to constitute an estoppel, nor can the question be raised, for the bill does not set out the whole charge, nor does it show any refusal to charge on this point, nor any objection taken at the time to the charge on this point.

But if there were such an exception, it could not be maintained because that portion of the charge set out is sufficiently favorable to the defendant corporation.

The court perfectly explained to the jury that a parol agreement made March 8 would not modify or control a written contract made March 9, (p. 52,) but that on March 8 a party might do an act which would disable him under certain circumstances from setting up a certain defense when sued on that contract. (P. 52.) "The claim is that this company, through its agent, made such representations to Mowry, the plaintiff, that he, *relying upon those representations*, failed to do the act which prevented this policy from lapsing and becoming forfeited, *because he relied upon certain representations*, and they claim if such representations were made, and that he relied upon them, and in reliance upon them failed to make the payment provided for by the terms of the policy, then that the company is estopped from setting up that forfeiture which is provided for by the policy *by reason of his having relied upon their representations and thereby failed to make the payment*. Now that is the principal question for you to consider in this case." (P. 53.) Then the court repeated the statements made, with some illustrations and added: "Now look at this language carefully, which was used by these parties, and see precisely what they fairly understood on both sides by this statement which was made." If this was a mere statement that it was the habit of the company to notify, then no estoppel would arise, said the judge, "but if you can find from the tesmony in the case that there was in the language which he used, or that there could be reasonably deduced from the language which he used a contract between those parties, that he should have that notice before he should be required to pay that instalment, and before that forfeiture for the non-payment of the annual premium should be insisted upon, if the agent made such a contract as that in behalf of the company, and the plaintiff considered him to have made it and assented to it, and there was a perfect agreement between these parties that the one party should have the notice, and should not be required to pay until he got the notice * * * I instruct you * * * that such an agreement would estop the corporation from setting up the forfeiture because the payment was not made at the time. But such a contract is not to be inferred; such a contract must be proved if relied upon. An estoppel is a thing which must be clearly proved against a party, because it deprives him of setting up a right which he has under his contract, and he is not to be deprived of that upon inference or guess, but upon positive proof." (P. 54.)

Certainly this called for all the elements of an estoppel *in pais:* an act deliberately done or a declaration deliberately made with the intent that the other party shall act upon, and the understanding on the part of the doer that the other will act upon it; followed up by action (or inaction) on the part of that other in reliance thereon, and because of reliance thereon; and such a change of situation upon that reliance that a forfeiture will take place from one party and in favor of the other, if the one is allowed to take advantage of the inaction which he has thus intentionally induced.

The distinction between acts and statements which become part of the contract of insurance and an estoppel, such as is here claimed, is obvious; in the one case they would become part of the policy itself, and the corporation would be forever bound and have no power to change it; but the essence of the estoppel is a course of conduct induced by that which constitutes the estoppel; the moment the corporation should inform

Mowry that they would not in future notify him, the estoppel would cease, because, after that, he could not say that in innocence and good faith he relied on receiving a notice from them. The defense confounds these two distinct things, and contends that the verbal acts of the agent cannot import a new term into the written contract afterwards issued by the company and accepted by the insured; this may be true abstractly, but it does not touch the case.

The general doctrines of estoppel are well stated in *Gregg* v. *Von Phul*, (1 Wall., 280.) The precise principle here involved was established in *Life Ins. Co.* v. *Wilkinson*, (13 Wall., 232); the court there conceded the well-known rule that oral negotiations and statements are merged in or obliterated by a reduction of the whole matter to writing as the contract of the parties; but, nevertheless, such preliminary and previous oral communications may be proved as the foundation of an estoppel, for that does not contradict or control the meaning of the written provisions, but shows that under certain circumstances they cannot lawfully be used by one of the parties. (See this case, p. 9, *infra*.)

See also Mayer v. Mut. L. Ins. Co. 38 Iowa, 305

Authority of the agent.

Substantially, all the exceptions, however, relate to the authority of Mr. John Shepley, as agent of the corporation. These exceptions are the first, second, fifth, sixth, seventh.

The sixth exception insists that the court should have instructed the jury that the statements of the agent, Shepley, would not bind the company, unless brought home to the knowledge of the company, (which, of course, must mean merely some other man connected with it,) before issuing and delivering the policy; the court refused to give this instruction, as asked, but did instruct the jury in response thereto, as follows: "It depends entirely upon the extent of his agency. If he is a general agent—agent with general powers as to the particular transaction—then his acts are the acts of the principal, and the same thing that would estop the principal, if said by himself, would estop him, if said by the agent within the scope of that agency." (P. 57.)

28 Minn 161

Bigelow 440-1 (2d ed)

31 Ill. [illegible] 37

Certainly this is sound law, and covered the request: the question is not whether the company had ratified a specific act done by a stranger; that generally would require knowledge on their part; it was whether in fact he was or had been recognized by the company, in dealing with the plaintiff, as its local agent. If he had been so recognized, his power was sufficient as matter of law.

Under the seventh exception, is set forth a portion (it does not profess to be all) of the charge relating to the same subject. The facts to which that charge applies, are these. Mr. Shepley's "representation was simply of a general nature; the plaintiff said: 'He came to me and represented himself to be the agent of the company.'" (p. 57) He then took the application for the insurance, put upon it his official certificate as agent; (recital in second exception, p. 50; certificate, p. 36.) After that, after he and no one else had represented the company in making the contract, the corporation not only adopted the contract he had negotiated, by issuing the policy which they, by handing it to Shepley, constituted him their agent to formally deliver to the plaintiff, but in and by that policy expressly informed the plaintiff that Shepley's position in the matter was not that of a stranger, or of a broker, but of their accredited local agent, whose signature, as such, was essential to complete the policy and make it binding on the company. The policy contained the following recitals: "The first payment * * * having been received by the company or their *accredited agent*." "In witness whereof, the said Union M. L. I. Co. have, by their president and secretary, signed this contract at their office in Boston, March 9, 1867, but the same shall not be binding until *countersigned and delivered by John Shepley, agent at Providence, R. I.*, nor until the advance premium is paid." (p. 57.) He signed the policy as agent, and delivered it. The indorsement on the application, made by the home office at the time, expressly recognized him as agent. (Top of page 29.) And when the plaintiff, Mowry, went to the office of the company in Boston, after the alleged forfeiture, and stated the agreement with Shepley about notice, the president did not suggest any lack of authority in Shepley. (Top of p. 52.) There was no positive evidence to show the precise powers of this agent, and the bill of exceptions states (p. 58) that there was no attempt by the corporation to show any limitation of his powers. The court instructed the jury, that, upon this general representation, and this ratification in general terms, and in the absence of any proof of any limitation, then "for all purposes within the scope of that business, which he undertook to do, which was entering into the contract of insurance, to the extent of that business which he undertook to do, and that contract which he undertook to make, his agency would be general as he represented it." (p. 58.)

In other words, when this man declared himself to be the agent of the company, solicited the party to enter into the contract, received the formal application and put the official certificate upon it, as agent, and thereupon the company issued the policy, declaring that their "accredited agent" had received the premium, and that his signature as local agent was needed to give validity to the contract, is the other person or is he not justified in acting upon the belief that the only person who has represented the company in the transaction has a general authority for all purposes within the scope of the business which he has transacted on behalf of the company, and which the company has taken the benefit of?

Observe that we do not seek to prove authority in this agent to waive a forfeiture after it had occurred, to create a new right or obligation after the old one had become dead; it might well be contended that a recognition in the policy or by acts, that at the time it was issued the man was agent to negotiate it and to issue it, would not always show power to do such a subsequent act: the power is not necessarily perpetual; recognition is retrospective and prospective; and therefore authorities upon such cases do not touch us. We ask that the corporation shall not be allowed to take advantage of a short delay, not injurious to them, because (unlike Stratham's case) this policy contained an express promise on our part to pay all future premiums, for the reason that the delay was caused by our just reliance on promises which they made and did not keep; and we rest upon an act done by Shepley, as their agent, in the course of and within the scope of busi which he did for them, and upon which and after which they declared that he was their agent.

Can the company employ him, as its "agent," to negotiate the contract, to receive the part payment down, to give validity to the contract by his signature, and then, after the party has acted in reliance on the assurances of the agent, made in the course of those negotiations, declare that that reliance shall work a forfeiture?

Similar attempts have been often made, and have as often failed.

> Insurance Co. *v.* Wilkinson, 13 Wall., 222.
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> Globe Mutual Life Ins. Co. *v.* Johns, 4 Am. Law Times, 123, Supreme Court of Penn.,, 1877, Weekly Notes of Cases, June 21, 1877.
>
> Rockford Ins. Co. *v.* Nelson, 75 Ill., 548.
>
> Boos *v.* World Ins. Co., 6 Thomps. & Cook, (N. Y.,) 364.
>
> May on Life Insurance, sec. 360.

Insurance Co. v. *Wilkinson*, 13 Wall., 222, is decisive of the case. It expresses the determination of this court that insurance companies shall not be allowed to reap the benefit of the business procured for them by men employed, paid, and held out to the public as agents for that purpose, and, at the same time, escape responsibility for the representations by which that business was obtained. It covers precisely the principle of law involved in the case at bar. The insured signed a written application—declared in it, that he understood that any misstatement of facts in it would vitiate his policy, and accepted a policy with a similar provision. The argument was very strong, in the first place, that this superseded all previous oral communications between the parties; and, in the second place, that when the party had entered into such a written contract with the company itself, it did not lie in his mouth to say that the local agent had power to do or to say anything which should, in a suit, take away a defense resting on those provisions, unless there was affirmative proof that the company expressly authorized, or, with knowledge, expressly ratified the act in question. This court decided otherwise on both points. They said, that the plaintiff might consider the application as not his act; not because, as against a stranger, he could repudiate what was clear and valid on its face, (p. 232,) but because the corporation, present and acting by its local agent, (the proof of whose authority went no further than in the case at bar,) should not be allowed to take advantage of a defect which had crept in with their knowledge, and by their consent, given at a time when it could have been corrected, and before the forfeiture arose.

Speaking of agents, who receive commissions, and by whose hands the policy is delivered, the court say:

> "The party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers, by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him?" The court held that he had, and continued: "The powers of the agent are *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal."

Now, if the existence of a local agent who solicits policies not only *prima facie* gives to the person so employed authority to make representations which, although directly contradicted by the express terms of the application subsequently signed by the party, and of the policy subsequently issued by the company, will yet estop the company from setting up some of those provisions which go to the very essence of the contract, but even serves as such conclusive proof of authority that an actual limitation will not control the presumption, unless brought home to the personal knowledge of the assured, certainly it is not error to instruct the jury that, in the absence of any attempt to show any limitation, the jury may infer that a similar authority belonged in this case to John Shepley, "accredited agent," "agent at Providence" of a foreign corporation.

Ins. Co. v. *Wilkinson* was expressly affirmed in *Ins. Co.* v. *Mahone*, 21 Wall., 152, and *Ins. Co.* v. *Baker*, 94 U. S., 610.

The precise case at bar has very recently been decided by the Supreme Court of Pennsylvania. We quote from Am. Law Times, August, 1877, p. 123.

> The general agent of a company agreed with the assured to notify her of the falling due of the premiums. Notices were regularly sent by the company for all payments of premium, except that immediately preceding the death of the assured, for which no notice was received by her, and which consequently was not paid. The policy contained a clause of forfeiture for non-payment of premium when due: *Held*, That it was properly left to the jury to determine whether the company by their misconduct misled the assured and caused her to pass the time, relying upon the notice to be given, and were therefore estopped from setting up the clause of forfeiture. *Globe Mutual Life Ins. Co.* v. *Johns*, S. C. Pa., W. N. C., June 21, 1877.

The other recent cases cited affirm the same doctrines, and indicate the same tendency of judicial decisions.

The jury were authorized, and, therefore, properly instructed to find this issue for the plaintiff, upon three grounds:

First, That in the absence of any controlling evidence, it was proof tending to show general authority from the outset.

Second, It tended to show by ratification and adoption, not a special authority to do this specific thing, but a general authority to transact the business of negotiating this policy, and as matter of law the acts in question fell within the scope of that business.

Third, It showed a holding out to the plaintiff of this man as agent in the business.

And there is no error unless the court can say that none of this evidence *tended to prove* the agency. We submit, that when you add to this proof, the failure of the company to even attempt to prove any limitation of authority, the jury were not only authorized, but under Clifton *v.* U. S., 4 How., 242, they were called upon to find that the agency was as extensive in fact as it was in appearance. 2 Kent, *621 note g.

See also Fay *v.* Noble, 12 Cush., 18.
Merch. Bk v. State Bk, 10 Wall, 645

The court stated (p. 58) that there was no attempt to prove any limitation. The evidence would bear out this statement. Its correctness was not objected to at the time and cannot be now.

Analysis of the exceptions. (*Record, p.* 50.)

First. The correctness of the instruction asked for, obviously depends upon the authority of Shepley, which the jury had not then passed upon; if given, it would have assumed that he had no authority; it was refused expressly upon that ground, and the jury were correctly instructed on the subject. (See sixth exception, top of page 57.)

Second. The ground which the instruction asked for sought to cover, is perfectly covered by the other instructions given on the subject of estoppel, and the subject of agency. The instruction asked for was faulty in confounding the two subjects. It would have led the jury to think that Shepley, though "recognized as their agent" by the company, without any limitation whatever, could not bind the company without an express subsequent ratification of each particular act within the scope of his agency. See top of p. 7, *supra.*

Third. The instruction here asked for was inapplicable, and would have misled the jury by confounding in their minds two distinct legal propositions. The claim of the plaintiff was not that the *contract* was changed, but that an estoppel had arisen; and the charge of the court properly stated the distinction and sufficiently instructed the jury. (See fol. 135, p. 52.)

Fourth. Apparently, the corporation had contended that Shepley's statements to the plaintiff were statements of what the usual habit of the corporation was, with regard to sending notices, and not statements of what the plaintiff could rely on. We submit, that the words themselves, taken all together, can only bear the latter meaning, and therefore that the charge on page 53 was sufficiently favorable to the company. Moreover, it is of the essence of an estoppel that the one party should intend that the other should understand his 'statements to be matters to be relied on, and that the other should so understand them, and rely upon them, and act upon them; these were questions for the jury, and the instructions on this point were very favorable to the corporation. (P. 53.)

Fifth. This exception again confounds the distinction between a change of contract and an estoppel. The court did not charge that the corporation could not deny that the verbal communications formed part of or modified the terms of the contract, but quite the contrary. (See fol. 135, on p. 52.) As to estoppel, it is certainly clear that the corporation might make such representations in negotiating the contract and as a basis for it, that it could not create a forfeiture based on an accidental delay, caused by those representations, at least until the representations were withdrawn or corrected. If the exception means anything, it means that this estoppel would never arise, and it is therefore too broad. See page 6, *supra.*

Sixth. This request embodies all the objectionable features of the charges asked in the first, and second, and third exceptions. No claim was made that the contract was changed. The effect of Shepley's acts depended upon the authority given him, or held out as belonging to him, and not merely upon an express subsequent ratification. Ins. Co. *v.* Wilkinson completely covers these and other similar exceptions.

Seventh. The court correctly instructed the jury upon the question of the inferences of authority which they had the right to draw from the proof. (V., p. 7, *supra.*)

Respectfully submitted by

C. S. BRADLEY,
J. J. STORROW, J. C. Collins
For Defendant in Error.

November, 1877.

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Supreme Court of the United States.

UNION MUTUAL LIFE INS. CO., *vs.* DANIEL A. MOWRY.	*Plffs. in Error.* No. 135.

The plaintiff in error relies upon the following points:

1st. That there was no relation of principal and agent existing between the defendant company and John Shepley at the time when Mowry was solicited to apply for a policy of insurance on the life of his uncle, Nelson H. Mowry.

2nd. That the representations and assurances as to notice to be given of recurring premiums falling due made by Shepley to Mowry cannot be claimed to be binding on the company so as to work an estoppel upon the company prior to the actual existence of the relation of principal and agent existing between Shepley and the company.

3rd. That Shepley did become, to some extent, the agent of the company *after* the application was accepted by the company, and deposit made with him of the policy for the purpose of receiving the first premium from

Mowry, upon the delivery of the policy to him and for the purpose of certifying to the condition of the health of the assured.

4th. That if an equitable estoppel can be worked upon the company founded upon the previous declarations of Shepley touching the subject of notice to be given when future premiums were falling due, it must be upon the theory that *his subsequent* appointment to an agency is a ratification and adoption of *prior* statements made by him when he was not an agent.

5th. That the proposition last above stated cannot be available to Mowry as a foundation for an equitable estoppel, unless it appears that a knowledge of such previous statements was made known to the company or to some one of its general officers who accepted the application; for the reason that it is the essence of ratification that it shall be founded on knowledge; this part of the case falling strictly under the principles of the law relating to principal and agent.

6th. That conceding it to be the law that material statements affecting the action of the policy holder, made by an agent having apparent authority to contract as to the terms upon which the policy shall be issued, may be made available to prevent the operation of a claim of forfeiture in the contract, on the doctrine of equitable estoppel; such effect can only happen, (estoppels being dependent upon the existence of technical conditions) when the relation of agency exists in fact at the time that such material representations are made, or is created afterwards with knowledge of what had been represented. If the relation of agency does in fact exist, then the principal is presumed to know of and to authorize all statements made by the agent within the proper scope of the business with which he is entrusted. If the relation does not exist, then the statements do not bind a party for whom he professes to act, unless subsequent ratification with knowledge, be shown.

7th. But material representations made by an agent within the clear scope of his authority do not in the absence of fraud affect the principal in case the agreement concerning the terms of which the representations were made has been subsequently reduced to writing because of the provisions of the statute of frauds. If, to avoid the statute, the doctrine of equitable estoppel be invoked, it should appear that the principal had as complete, actual or constructive knowledge of the representations made by the agent, as, if the statute were not in the way, it would be necessary to make out in order to charge the principal under the law of agency.

8th. That if Shepley at the time that he made the representations to Mowry touching the matter of notice of premiums falling due had been the appointed or recognized agent of the company to solicit insurance with all the powers which by any intendment from the words used in the policy can be declared to be the scope of such powers, the defendant company is not estopped to set up the forfeiture by reason of the neglect to pay the premium due March 9, 1878, because it appears that such agency was for a limited and special purpose, and any statement touching the terms of insurance was beyond the scope of his employment, and Mowry had no right to trust to such statements.

9th. That whatever view may be taken of the relation of Shepley to the company at the time when the application was taken or afterward, the fact is that the statements made by him at the time when he solicited Mowry to insure his uncle's life in the company are in conflict with the written terms of the contract of insurance subsequently issued by the company and accepted by Mowry, and direct notice was after such representations were made, brought home to Mowry that no agent had power to alter the terms of the policy by the clause in the contract, "no agent of this company except president and secretary can waive such forfeiture oralter this or any other condition expressed in this policy," and on this ground any equitable estoppel which otherwise might be worked upon the company fails.

10th. That the language used by Shepley to Mowry, touching the matter of notice, was in effect an assurance as to the future, and not a statement of an existing fact, and on this ground one of the essential elements of an estoppel fails.

BENJ. F. THURSTON,

CHAS. H. PARKHURST.

Dec. 17, 1877.

Supreme Court of the United States.

No. 135. DECEMBER, 1877.

THE UNION MUTUAL LIFE INSURANCE COMPANY,

PLAINTIFF IN ERROR,

vs.

DANIEL A. MOWRY.

In Error to the Circuit Court of the United States for the District of Rhode Island.

SUPPLEMENTAL BRIEF FOR MOWRY, DEFENDANT IN ERROR.

This cause was argued Dec. 13 and 14, 1877. Since the argument the plaintiff in error asks leave to file a statement of the points it relies on. We consent and submit the following on our part: —

(1.) ESTOPPEL. We have sufficiently stated the grounds of the estoppel relied on: we do not attempt to vary or invalidate the terms of the written contract by proof of previous verbal communications; under the instructions of the court the jury found as matter of fact, that it was intended that we should rely on the assurances given; that we did rely on them; and that this reliance was the cause of the delay in payment upon which the corporation seek to rest a forfeiture; we insist that the corporation cannot take advantage of a slip which they have intentionally led us into.

The corporation did not in the argument, and do not in their "points" seriously controvert this branch of the case.

(2.) AGENCY. If John Shepley was the local agent in Providence of this foreign corporation, the power which, as matter of law, he is taken to possess, and is thereby held out to possess, is broad enough to cover the acts in question.

(3.) It is not material whether he had previously been, or ever was formally appointed local agent, if the corporation by their principal officers so dealt with us that when we accepted the policy we were authorized to believe that he occupied that position, or if they ratified to us his assumption of that position.

(4.) He did assume to act as such, first by his verbal representations to us; afterwards (whether *before* or after the assurances does not appear), he so represented himself by his signature to the application (record p. 36).

The corporation in substance ratified this assumption (if it was such) and held him out as agent by accepting the business he negotiated for them, by accepting and acting upon the application signed by him as "agent at Providence," by the recognition of his position as "agent at Providence" in the policy, and by the recital that the premium which we paid to him upon delivery of the policy had then been received by their "accredited agent."

(5). These and other proofs in the case authorized the jury to find as matter of fact, that his original representations of agency were, in fact, correct at the first moment when he made them.

(6). The charge of the court which, in various forms and chiefly by the seventh exception, is brought up for review, is spread out on pp. 41, 42 of the record. It instructed the jury that upon these facts and in the absence of any controlling evidence, they might find that Shepley either was or was adopted by the corporation as its local agent, so far as the plaintiff was concerned. This is not error.

Respectfully submitted by

C. S. BRADLEY,
J. J. STORROW,
J. C. COLLINS,
For Mowry, Defendant in Error.

BOSTON, Dec. 18, 1877.

The clause referred to in the Pln's Co's 9th point is a literal copy of that found in Wilkinson's case, 13 Wall and the point is completely answered by that decision.